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No. 79

In the

Supreme Court of the United States

OCTOBER TERM, 1946

LEO H. STEELE,
Petitioner,

VERSUS

GENERAL MILLS, INC.,
Respondent.

BRIEF OF RESPONDENT ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

GENERAL MILLS, INC., *Respondent.*

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November, 1946.

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BRIEF OF RESPONDENT ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Justices of the Supreme Court of the United States:

PRELIMINARY STATEMENT

Respondent takes issue with petitioner's statement that the trial court decided every issue favorably to petitioner. There were only two issues of fact presented by the evidence, both of which were submitted to a jury in the trial court, and the jury's special verdict on these two issues of fact was in all respects favorable to respondent (R. 62 and 63). The trial court did not set aside the jury's special verdict but allowed the jury's special verdict to

stand (R. 80, 81 and 291) and rendered judgment notwithstanding the verdict. The holding of the trial court was that petitioner was entitled to recover as a matter of law, notwithstanding the facts found by the jury favorably to respondent (R. 279-293). The issues before the trial court and before the Fifth Circuit Court of Appeals were:

I. Whether under the evidence in the case and the facts as found by the jury the tariffs of the Railroad Commission of Texas relied upon by petitioner were applicable to the transportation services performed by him.

II. Whether the order of the Commission and the permit, to the extent that such order and permit might be construed as an attempt on the part of the Commission to apply the Commission's tariffs here involved to the transportation services to be performed by petitioner, were void upon their faces.

III. Whether the orders of the Commission and permit issued by it under the facts and findings of the jury were void as rate making orders.

IV. Whether under the Texas Motor Carrier Act the Railroad Commission had power or jurisdiction over petitioner's charges for transportation services performed for respondent.

V. If in fact the Legislature of Texas did confer power upon the Commission to fix compensation to be charged by petitioner to respondent, and if in fact the Commission undertook to exercise such power, whether the legislative source of power and the act of the Commission itself were in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

VI. Even if the Commission had the power to fix rates for the transportation services performed by petitioner, and did so, and the legislative grant of power to the Commission and the acts of the Commission thereunder were not violative of the Federal Constitution, whether petitioner, under the facts in this case, could recover the difference between the contractual consideration paid to and accepted by him and the rate of compensation fixed by the Commission.

VII. Whether petitioner's cause of action, if any he had, or any part thereof, was barred by the Texas two-year Statute of Limitation.

There were before the Fifth Circuit Court of Appeals certain other specifications complaining of rulings of the trial court on questions of law, which specifications were not decided by the court below and which are referred to in Section Four of this brief.

Points I to V above noted were inferentially decided adversely to respondent by the court below without discussion (R. 312). The court below found favorably to respondent on Point VI (majority opinion, Circuit Court of Appeals, Fifth Circuit, R. 308-318, and opinion on rehearing, same court, R. 344-346). Point VII was not considered by the court below. The court below held that the Texas statute relied upon by petitioner was not enacted for his protection and that he had no cause of action either under the contract sued upon or under the statute. The judgment of the Circuit Court of Appeals reversed the judgment of the trial court and remanded the case with instructions to the trial court to enter judgment for respondent.

Petitioner has divided his brief into two sections. Section One deals with the holdings of the Fifth Circuit Court of Appeals adverse to him. Section Two, which he improperly designates as "Relating to Immaterial Issues", deals with Points I to V and Point VII noted above. Point VI (the ground upon which the court below predicated its judgment) becomes immaterial if respondent's position is correct with respect to any of Points I to V. We therefore take the liberty of presenting the points involved in their logical order rather than following the order of petitioner's presentation.

NATURE OF THE CASE

Petitioner's statement of the nature of the case is incomplete and in some respects incorrect. The nature of the case is correctly stated in the majority opinion of the Fifth Circuit Court of Appeals (R. 303-318). In order to clearly present our position to this Court we will here make a more complete statement of the nature of the case. There was no dispute in the facts except perhaps with respect to the two issues made the basis of the jury's special verdict in the trial court. Neither petitioner nor his attorneys, whose conduct is made the basis of the findings of the court below, testified at the trial, although present.

At page 4 of petitioner's brief it is stated that petitioner, in response to one of the requirements of the Commission, made the following statement in his application for a permit:

"Applicant proposes that the tariff to be charged

for the services proposed to be rendered will be that as promulgated by the Railroad Commission of Texas."

There is no evidence that this statement was made pursuant to any requirement of the Commission. Furthermore, there is no evidence that respondent ever saw petitioner's application for a permit containing this statement. On the other hand, the evidence affirmatively shows that respondent made no application for a permit to have petitioner transport goods for it; that it knew nothing of the contents of petitioner's application and did not join therein (R. 141 and 142). The further statement is made at page 4 of petitioner's brief that respondent, through its Traffic Manager, Mr. McCraney, appeared and testified under oath before the Commission concerning the proposed operation. The Record does not support this statement. Petitioner made substantially this averment in Paragraph V of his complaint (R. 5) and respondent did admit in its answer that Mr. McCraney testified as a witness before the Commission but otherwise denied petitioner's averment in the respects stated (R. 43).

Respondent's answer to the demand for admissions only went so far as to admit that Mr. McCraney testified as a witness before the Commission (R. 110 and 111). There is no evidence whatsoever that respondent appeared at the hearing before the Commission in support of petitioner's application or that McCraney was a representative of respondent at the hearing. Insofar as the evidence is concerned, Mr. McCraney was in attendance at the hearing as a witness and not in a representative capacity for respondent. There is not one iota of evidence with respect

to the testimony given by Mr. McCraney. Petitioner and his attorneys doubtless could have given testimony upon this subject at the trial had they desired. On the contrary, in face of the denials in respondent's answer, they remained silent.

Petitioner's statement that on August 26, 1940, petitioner and respondent entered into a contract by the terms of which it was agreed that petitioner would charge and respondent would pay the rates as fixed by the Railroad Commission of Texas, and subsequently, on July 31, 1941, entered into a second contract providing that respondent would pay and petitioner would collect a lesser rate than the one prescribed by the Commission, is not a correct statement of the facts and is fully answered by the opinion of the court below. That court, from the undisputed evidence, after referring to the two instruments, made this finding:

> "There was but one contract that spoke the actual intent and agreement of the parties, and that was the amended contract under which all of the services were performed. Appellee says that this provision in the supplemental contract for the payment of Steele is void, and he ignores the fact that it is a part and parcel of the only contract on which he can declare" (R. 312).

Although the so-called first contract bears date August 26, 1940, it was not executed and delivered until April 17, 1941 (R. 152, 153), which was long subsequent to the date petitioner's application for a permit was filed with the Commission and hearings were held thereon (R. 94). The supplemental agreement (which the parties contemplated

from the inception would be entered into) provided generally that respondent would pay petitioner, for the transportation services to be performed by petitioner, the latter's cost, plus 10%, plus certain additional remuneration therein provided for. It is readily apparent from this statement that the amount required to be paid petitioner under the terms of the agreement could have exceeded the rates fixed in the tariff upon which petitioner now relies. At the time the supplemental agreement was entered into (R. 155-159) the situation with respect to the applicability of the Commission's tariff was the same as it was at the time this case was tried in the trial court and at the present time. The tariffs and order of the Commission now relied on by petitioner were then in effect. The permit had been granted. Nevertheless and notwithstanding petitioner's present contention, it was expressly stated in the supplemental agreement executed by both of the parties in part as follows (R. 155, 156):

> "Whereas, the parties hereto entered into a certain transportation contract under date of August 26th, 1940, as above referred to, and by the terms of paragraph 13 thereof, it was mutually agreed that the compensation to be paid for the services thereunder to be rendered by first party, or the rates to be charged by first party and paid by second party should be such rates, charges, or tariffs as may be fixed by the Railroad Commission of the State of Texas and in conformity with the rules and regulations then in existence or that might thereafter be promulgated by said Commission for the kind and character of services to be rendered thereunder; and,
>
> "Whereas, the Railroad Commission of the State of Texas has not fixed rates, charges or tariffs for the

kind and character of services to be rendered under said contract; and,

"Whereas, the parties desire to specifically agree upon the compensation to be paid to first party by second party for the services rendered or to be rendered upon said contract, and, to supplement and amend said contract as set forth herein:

"Now, therefore, premises considered and for the considerations contained in the original contract of August 26th, 1940, and herein contained, it is mutually agreed as follows, to-wit:

"1. Paragraph 13 of said contract of August 26th, 1940, is supplemented and amended to read as follows, to-wit:

"'13. It is mutually understood and agreed that the Railroad Commission of the State of Texas has not fixed any rates, charges or tariffs, and has not promulgated any rules and regulations respecting, for the kind and character of service to be rendered hereunder, and that the cost to second party to be paid to first party for the services rendered or to be rendered under this contract shall be calculated upon a cost-plus basis as hereinafter set forth. * * *"

It is true that the trial court did peremptorily instruct the jury to render a general verdict in petitioner's favor (R. 279-293) but this was after the jury's special verdict favorable to respondent was returned and filed (R. 270, 80, 81) and after the court expressly refused to set aside the jury's special verdict (R. 290, 291). On the other hand, the jury's answers to the special interrogatories submitted by the court were received, filed and allowed to stand as the jury's special verdict in the case (R. 80-81). Judgment was rendered notwithstanding such verdict. The trial

court did file findings of fact and conclusions of law over respondent's seasonable objections (R. 76-79). Respondent complained of the trial court's action in making findings of facts by appropriate specifications of error in the court below (see Specifications V and VI, page 17, appellant's brief, Circuit Court of Appeals, and argument thereon, pages 79 and 80). In cases tried before a court without a jury it is the duty of the trial court to file findings of fact and conclusions of law under Rule 52, Rules of Civil Procedure. In cases submitted to a jury on special issues the court may make findings on an omitted issue (Rule 49), but this seems to apply only where a judgment is rendered on the special verdict. In any event the right to make findings under Rule 49 is limited to omitted issues. It was improper for the trial court to make findings of fact and we respectfully submit that such findings should not be considered for any purpose.

ADDITIONAL STATEMENT OF CONTROLLING FACTS

A. Background of contract and performance thereof.

In the year 1940 and for some time prior thereto the petitioner, Steele, was an employee of respondent, General Mills, Inc., in charge of the transportation by truck of certain products of respondent from its Oklahoma City plant, where petitioner was stationed. Respondent entered into a contract with an independent contractor at its Oklahoma City plant to haul a certain class of its products from the plant direct to its customers instead of making such deliveries direct in trucks of respondent, as had

previously been the custom. The new transportation arrangement at Oklahoma City was on a cost plus basis; that is, the contractor received his costs, plus 10% as compensation for hauling and delivering the products. Respondent thought it desirable to make a similar arrangement at Wichita Falls and tentative plans were worked out with petitioner whereby he would leave the employ of respondent, move to Wichita Falls and enter into a transportation arrangement similar to the arrangement then in effect at Oklahoma City. Preparatory to putting the agreement into effect, petitioner did move to Wichita Falls, Texas, and for a time superintended the transportation and delivery by truck of the products of respondent from its Wichita Falls plant. While petitioner was at Wichita Falls, and prior to the commencement of the arrangement here involved, respondent forwarded to him a contract to be executed similar to the contract in effect at Oklahoma City, expressly providing that petitioner would be paid for his services the actual cost thereof, plus 10% and plus certain additional administrative charges. It was also contemplated that respondent would sell petitioner the trucks then in use by it and these trucks, suitably adapted for that purpose, would be used by petitioner in transporting respondent's products (R. 135-138, 159). Petitioner thereupon submitted the proposed contract to his attorneys in Fort Worth (the same attorneys now representing him in this litigation) and Mr. Morgan, one of his attorneys, wrote him on February 28, 1941, as follows (R. 140-141):

"Dear Mr. Steele:

"Since you left this morning, I have again carefully

considered the proposed contract to be entered into between you and General Mills.

"Paragraphs 13, 14, 15, 16 and 17, which are set forth on pages 4 to 7, are in direct conflict with the statutes of the State of Texas and therefore they must be eliminated from the contract. In lieu thereof the following paragraph should be inserted:

" 'It is mutually agreed between the parties that the rate to be charged by the first party and paid by the second party for the services contemplated to be rendered as provided in this contract shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission.'

"Therefore, we recommend that your contract be rewritten whereby you delete the paragraphs above listed and insert in lieu of the above.

"Very truly yours,

"(Sgd.) CECIL A. MORGAN.

"Mr. Steele:

"P. S. A custom has long prevailed in this state that contract carriers must carry such provision as outlined in the letter to which this is attached relating to rates and charges. Then after the contract carrier certificate has been issued the contract carrier and shipper work out their own arrangements. Therefore there is very little for your company to be concerned about regarding this change.

"Very truly yours,

"(Sgd.) CECIL A. MORGAN.

"Special delivery."

A copy of this letter was delivered by petitioner to Mr. Colfix, the division comptroller of respondent, at Oklahoma City (R. 138). After correspondence between the parties, Mr. Christopher, a member of the firm representing petitioner, wrote Mr. Colfix, of respondent, quoting Section 6aa of Article 911b, Texas Civil Statutes, and concluded his letter with the following statement:

> "I believe this fully answers your question, but if there are other questions we shall be pleased to answer them, and further than that I might make some valuable suggestions to Mr. Steele or to yourself with reference to this matter the next time Mr. Steele is in the office" (R. 145).

A conference was arranged in the early part of April, 1941, at which time there were present Colfix, petitioner, and Mr. Christopher, one of the attorneys for petitioner. Colfix, at the trial of the case, testified without contradiction as follows (R. 147-148):

> "I indicated to these gentlemen that the form of contract that they proposed to us was entirely different than the understanding that Mr. Steele and our company had as to the financial arrangements for compensation, and I attempted to determine from them whether or not this contract was first, legal, and second, whether or not it would make possible the type of financial arrangement that we wished, and they assured me, first, that in order to get a permit it was necessary to put in the standard clause and that the Railroad Commission had never prescribed rates for this type of service, and it was their opinion that such rates would never be prescribed; that we could go ahead and make this form of contract and then before we started our operations that we could legally exe-

cute a supplemental contract for the type of service that would be rendered by Steele for us.

"I indicated to these gentlemen that our company had a great deal of confidence in Mr. Steele, and that we never expected to have any difficulty with Mr. Steele in this type of contract, but I did wonder if there was any possibility that some later Court ruling or interpretation being made that the Railroad Rates could apply to the contract that we had, and they informed me again that the contract was a legal contract, that it was an agreement between two parties and that the Railroad rates for common carriers would not apply to our operation and that we would have nothing to worry about.

"Mr. McKnight: You say the contract was a legal contract, to what contract do you refer?

A. I refer to the original contract as suggested by them, supported with a supplemental contract for charges. You see the original contract had no basis for charges under the theory that the Railroad Rates did not apply, and we must have charges, between individuals.

Q. And that was what you expected to put in your supplemental contract, the agreement with respect to rates?

A. That is correct.

Q. That was to what your conversation was directed?

A. That's correct."

And further (R. 197):

Q. "All right, I will ask you this question, Mr. Colfix, in this conversation you had with Mr. Christopher and Mr. Steele, in the office of Mr. Christopher in Ft. Worth on April 11, 1941, I believe

it was, according to the date of this letter, was there any suggestion made by Mr. Christopher at that meeting that this supplemental contract be submitted to the Railroad Commission?

A. No, no such suggestion was made."

Neither petitioner nor his attorney, Mr. Christopher, testified at the trial of the case, though both were present. The testimony of the witness, Colfix, is undisputed.

Following this conference Mr. Christopher wrote and forwarded to Colfix the following letter (R. 149-151):

"This is in reference to and confirms our conversation of this morning while you and Mr. Steele were in the office. It will also supplement our letter to you of April 3rd.

"It is absolutely necessary so far as obtaining the grant of the contract carrier permit is concerned that the contract between General Mills and Mr. Steele recite that the charges to be made will be such charges as have been prescribed by the Railroad Commission of Texas, that being under the provisions of the statute of, as quoted to you in my letter of April 3rd, copy of which is also enclosed herewith.

"In my letter to you of April 3rd, I pointed out the fact that the Railroad Commission has attempted to prescribe rates for contract carriers, that being contained in Railroad Commission of Texas Tariff Circular No. 2-A, which fixes a minimum rate for contract carriers only, at the rates prescribed for common carriers.

"You will especially observe the language of the statute which contains the following language:

" 'The Commission shall prescribe minimum rates, fares and charges to be collected by such contract car-

riers which shall not be less than the rates prescribed for common carriers for substantially the same service.'

"Of course, you have not had any experience with the service of contract carriers, but you do anticipate that the service to be rendered under the contract which you propose to make will not be a service which will be in any respect 'substantially the same service' as is rendered by common carriers, for the simple reason that this contract carrier, if you enter into a contract and if the permit is approved, will devote all of its time and attention to you exclusively and to no other member of the general public. The trucks which he operates will be dedicated to your service alone and will not operate in the service of any other member of the general public. He will be subject to your direction and command at all times the same as his trucks will be and will have no regular schedules and no regular routes as common carriers must have, his trucks will be ready to operate from Wichita Falls or from other points at any hour of the day or night which you may direct in order to render the service which you require and will operate over most direct routes to any destination to which your commodity will move without awaiting scheduled departure times and without the interlining of the shipments at connecting carrier points, as well as many other services which cannot at all be rendered by common carriers.

"It may not, therefore, be said that the service which will be rendered by this contract carrier can never in any event be a substantially similar service to that rendered by common carriers.

"The Railroad Commission of Texas, in the almost ten years now since the Truck Law was passed as it now exists has not at any time undertaken an investigation of the services rendered by contract carriers

nor have they undertaken any investigation of the cost of such service or any of the other factors which would enter into rate making. Of course, you do not know about these costs or advantages either, because you have not operated with the benefit of a contract carrier. Just what operating cost would be and what particular advantages will be worth then as may be anticipated cannot now be determined by you without some experience.

"It is my thought on this matter that it should be entirely agreeable with you to make the contract as is proposed by Mr. Steele now in your possession, and that thereafter and after the contract carrier permit is granted, if it is granted, and after you have had some experience with the operation that it is going to be necessary and entirely proper under the law that some supplemental contract be entered into based upon the service rendered. That such an arrangement will not be violative of the provision of the statute quoted in my letter of April 3rd, for the very simple reason that the two services, that is, contract and common carrier service cannot be compared so that it can never be said that the two services rendered could be 'substantially the same.'

"We have given considerable thought to various other elements entering into consideration of whether or not you should make this contract as suggested by yourself this morning, that is various contingencies that might arise following the execution of the contract and the institution of the operation. We think, however, that you fully understood our position with reference to those matters and I do not believe that any complication could possibly arise on account of any of those things, and since it is my impression that you

wished our opinion with reference to the particular section of the statute involved along we do not assume that it is necessary for us to discuss those matters.

"Personally I do not believe that there will be any element of violation of the law involved if subsequently some additional contract is entered into supplemental to the original contract adjusting the rates based upon experience and the service actually rendered in comparison to service of common carriers. To me, however, it is simply a reasonable business risk, if it is a risk, which you can afford to take.

"Very truly yours,

"tsc/ds "T. S. CHRISTOPHER."

Following receipt of this letter, one of the attorneys for respondent in Oklahoma City conferred with petitioner's attorney over the telephone and thereafter an amendment was made to paragraph 13 as proposed by petitioner's attorneys so as to add the following phrase:

"For the kind and character of service to be rendered hereunder" (R. 152).

This language is found in the contract as executed (R. 91). Thereafter Colfix wrote Mr. Christopher a letter of date April 17, 1941, as follows (R. 152-153):

"Yesterday you discussed with Mr. France a change in paragraph 13 of the contract between Mr. Steele and General Mills. As a result of this conversation you both agreed to add the following phrase to the end of Paragraph 13, 'for the kind and character of service to be rendered hereunder.' We have made this change and have executed two copies of the contract which are being sent to you at this time.

"After full consideration of the matter our attorneys are of the opinion that it is quite in order for us to make this type of contract and later have a supplemental agreement for costs as may be agreed upon between Mr. Steele and General Mills.

"I did not indicate the date of execution no Page 1 and page 5, as I thought it might make some difference as to whether or not the present date was indicated or whether you wanted to go back to the time you started your hearings with Railroad and Warehouse Commission. Will you please investigate this date and advise me in order that I might place it on my copy."

The date, August 26, 1940, was inserted in the contract, although it was not actually agreed upon and executed until after April 17, 1941 (R. 153). Following the letter to Mr. Christopher last referred to, a supplemental agreement was drawn up and agreed to between the parties (R. 154) and is found in the Record at pages 155-159. It was delivered to petitioner, Steele, personally at Oklahoma City or mailed to him at Wichita Falls (R. 154). He executed the agreement and returned it to Colfix (R. 154). The supplemental agreement is dated July 31, 1941, and amends Paragraph 13 of the original agreement. Although the tariff relied upon by petitioner was in effect at the time, it is recited in the supplemental agreement that the Railroad Commission of Texas had not fixed any "rates, charges or tariffs for the kind and character of services to be rendered under said contract" and the parties thereupon set forth the amount of compensation to be paid petitioner by respondent. The compensation fixed was that originally agreed upon and set forth in the initial draft of the con-

tract mailed to petitioner Steele (R. 155). This compensation generally was based upon petitioner's costs, plus 10%, plus certain administrative charges, and evidenced the real agreement between the parties from the inception of the negotiations. No transportation services were performed by petitioner until after the execution of the supplemental agreement. It was in full effect during all the times involved. Petitioner's operations started on August 1, 1941, and continued through October 31, 1943, a period of twenty-seven months. Each month petitioner billed respondent for services strictly in accordance with the terms of the supplemental agreement and was paid on that basis currently (R. 160). In this connection the witness, Colfix, testified, without contradiction (R. 162):

Q. "Now, during the entire period of this operation, before its termination, some twenty-seven months after it started, did Mr. Steele ever make any claim to you that he was entitled to be paid on the basis of the Railroad Commission's tariff rates?

A. No, sir.

Q. Was there any such claim as that ever presented to you until after the termination of this agreement?

A. None."

B. Nature of services performed by petitioner.

There were submitted to the jury in the trial court two issues of fact. These issues and the jury's answers thereto, constituting their special verdict, were as follows:

"No. 1.

"Do you find from a preponderance of the evidence in this case that the operations of plaintiff Steele under his contract with defendant were in competition with common carriers over the highways of Texas? Answer 'yes' or 'no'.

"Answer: 'No'.

"(Signed) Mickey Maguire, Foreman."

"Do you find from the evidence in this case that plaintiff Steele rendered substantially the same service as that rendered by common carriers, during the time, and in the area of transportation here involved? Answer 'yes' or 'no'.

"Answer: 'No'.

"(Signed) Mickey Maguire, Foreman" (R. 80).

The evidence adduced at the trial amply supports the special verdict, which the trial court permitted to stand. Petitioner hauled for respondent alone in specially designed trucks formerly used by respondent for this purpose (R. 159). None of the tonnage previously handled by common carriers was diverted to petitioner's trucks (R. 137). Respondent required a specialized type of delivery service, due to competitive conditions, which was not available from common carriers (R. 162, 163). It was not customary for other milling companies in the area to use common carriers in the distribution of their products in the area surrounding their milling plants (R. 164). Many of respondent's customers to whom deliveries were required to be made were not at locations where they could be

served at all, or at least as quickly with common carrier service (R. 165). A special type of truck bed was required for the purpose of transporting respondent's commodities (R. 165). It was necessary that respondent's products be delivered into its customers' places of business and stacked for display. This service was not provided by common carriers (R. 166). It was also necessary for the truck drivers to pick up rejected merchandise and return it to respondent's mill (R. 167). Generally the trucks left respondent's plant loaded with orders for a number of customers to be dropped along the route of delivery (R. 167). The trucks would not travel on any given route but would go where deliveries were necessary (R. 167, 168). On return trips the trucks principally hauled sacked flour out of the Wichita Falls mill (R. 167) and picked up bulk wheat on their return (R. 168). Common carriers did not have satisfactory equipment in which to transport bulk wheat (R. 168, 169). Petitioner did not maintain terminals or warehouses; his trucks were left upon respondent's premises at Wichita Falls (R. 169).

At the time the contract was entered into with petitioner respondent had the problem of distributing its products in competition with other mills within the trade area surrounding its mill, as well as the actual problem of transportation, all of which was provided for in the contract with petitioner (R. 170), who under the contract obligated himself to deliver and transport respondent's products *according to its requirements* (R. 88). Under the contract petitioner's trucks were devoted exclusively to handling respondent's merchandise (R. 89). Respondent reserved

the right to specify the manner in which petitioner's trucks should be painted and reserved the right and privilege of requiring advertising or other written matter to be painted thereon.

Frank Cross, in charge of transportation for respondent, testified that respondent's products moving more than 150 miles from Wichita Falls generally went by rail in carload shipments (R. 199). The deliveries within a radius of 150 miles from Wichita Falls moved as LCL (less than carload) shipments and prior to the arrangement with respondent were generally handled either in respondent's trucks or under a separate trucking arrangement (R. 199-200). This witness analyzed the transportation of respondent's commodities in and out of its Wichita Falls plant during the 27-month period covered by petitioner's operations, and for the preceding 27-month period, and found that no tonnage handled by common carriers during the preceding 27-month period was diverted to petitioner's trucks. The tonnage delivered by petitioner was substantially the same tonnage which, during the preceding period, respondent delivered in its own trucks (R 200-208). According to the same witness, petitioner served in his trucks one hundred and forty points or destinations. Twelve of these points did not have any common carrier service at all (R. 209). Forty-eight of the points did not have any direct rail or common carrier service (R. 209). Of the remaining eighty points having common carrier service, forty-two were served by both rail and truck lines; twenty-four were served by truck lines only; and fourteen by rail

lines only. Eleven of the eighty points required an interline or joint service (R. 209-210). Petitioner did not maintain any docks, stations or depots such as common carriers (R. 210); he did not use pickup and delivery trucks (R. 211) so as to require a double handling of merchandise; the witness Cross pointed out that about 70% of the tonnage handled by petitioner was sacked flour (R. 207) and that flour is very susceptible to contamination (R. 212). In order to prevent contamination trucks in which flour is hauled must be kept clean and fumigated; lined with a special kind of paper; and not mixed in the same truck with other merchandise (R. 212-213). This was one of the reasons why a specialized service such as furnished by petitioner was required and that common carrier service was not adequate or suitable (R. 212-213).

Petitioner Steele testified before the Railroad Commission and a transcript of his testimony was read at the trial of the case (R. 233-238). His testimony in substance shows that it was impractical to ship LCL flour by common carrier truck or rail lines for numerous reasons, including contamination (R. 234), and delays in shipment (R. 235). He pointed out that in most instances two line hauls were required when common carrier service was used (R. 237); whereas respondent required its deliveries to be made at any time and over any routes. To use his words:

> "In other words, we go sometimes in a circle, and come back which would be the shortest way around" (R. 236).

Petitioner hauled for General Mills alone; his permit and the order granting it confined his operations to handling products of General Mills (R. 94 to 100). Mr. Christopher, in his letter of April 11, 1941, to respondent's representative, himself agreed with the jury's special verdict that the service to be rendered by petitioner was not similar service to that rendered by common carriers. He reached this conclusion from the facts in connection with his construction of Sec. 6-aa of the Motor Carrier Act. He made this very pointed statement (R. 150):

> "It may not, therefore, be said that the service which will be rendered by this contract carrier can never (ever) in any event be a substantially similar service to that rendered by common carriers."

The agreement of the parties, expressed in the supplemental contract (R. 156), that the Railroad Commission of Texas had not fixed rates, charges or tariffs for the kind of services to be rendered under the contract, was of necessity an agreement that the services to be performed were not competitive with services rendered by common carriers and that such service was not substantially the same as common carrier service. The order of the Railroad Commission (R. 94 to 98), relied upon by petitioner as a ratemaking order, finds facts from which only one inference can be made, and that is that the service to be performed by petitioner was not competitive with common carrier service and was not substantially the same as common carrier service.

The foregoing brief summary demonstrates that the evidence in the trial court amply sustains the special ver-

dict of the jury. In fact, the sufficiency or insufficiency of the evidence to sustain the special verdict of the jury in the trial court is not before this Court since the trial court permitted the special verdict to stand and did not set it aside.

ARGUMENT AND AUTHORITIES

Section One

Answer to Section Two of Brief of Petitioner.

1.

The Railroad Commission was without lawful power to fix rates or charges for the transportation services rendered by petitioner because the evidence showed and the jury in the trial court found that the operations of petitioner over the highways of Texas were not in competition with common carriers and the services performed by him were not substantially the same as those performed by common carriers. The orders and acts of the Commission, insofar as they may be construed as an effort on the part of the Commission to fix minimum rates and charges for the transportation services here involved, were therefore void.

2.

The Railroad Commission of Texas did not undertake to apply minimum rates and charges to the transportation services here involved.

3.

If the orders of and permit issued by the Commission be construed as applying the rates set forth in the tariff relied upon by petitioner as minimum rates for the transportation services here involved, then such orders, permit and tariff to this extent are void

on their faces because the Commission failed to find, as it was required to do, before exercising the limited and conditional ratemaking power conferred upon it by law, that the proposed operations of petitioner were in competition with the operations of common carriers over the highways of the state.

4.

Respondent did not invoke the jurisdiction of the Railroad Commission to fix rates for the contract for carriage here involved nor for any purpose whatever.

5.

If the Legislature of Texas did declare the operations of every contract carrier to be in competition with common carriers and authorize the Commission to apply the minimum rates of common carriers to the operations of all contract carriers, then the statute and the acts of the Commission thereunder as applied to the transportation services here involved contravene the Fourteenth Amendment to the Federal Constitution and are void.

6.

If the Texas statute is construed as not requiring the Commission to find the existence of facts prerequisite to the exercise of its conditional ratemaking powers, then the statute violates the due process clause of the Federal Constitution.

All of the above propositions of law were urged by respondent in the trial court. The ruling of the trial court

thereon was adverse to respondent. This ruling was properly assigned as error by respondent in the court below by appropriate specifications of error. These specifications of error were disposed of by the court below in the following language:

> "We will not enter into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier without first determining whether or not it was in competition with, and performing services substantially similar to, a common carrier, nor the related question as to whether Section 6-aa, without making same applicable to contract carriers in competition with common carriers, is unconstitutional and void, for we agree with Appellee that the supplemental contract to pay rates less than those provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him" (R. 312).

Had the court below sustained the specifications involving the points here presented, the same judgment as was entered by that court would have necessarily followed. The grounds here stated are not presented to overthrow the judgment of the court below but to sustain such judgment. They present additional reasons why the judgment should be sustained. Respondent has the right to present these additional grounds here and if this Court finds any or all of such grounds to be well taken the judgment of the court below should be affirmed, even though this Court might conclude that the court below improperly decided the law question upon which that court based its judgment. *Langnes* v. *Green*, 282 U. S. 531, 535, 536, 537.

539; 75 L. Ed. 520; *Story Parchment Co.* v. *Paterson Parchment Paper Co. et al.*, 282 L. S. 555, 560, 75 L. Ed. 544; *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 190, 191, 81 L. Ed. 593.

A. The State Legislature only delegated to the Commission power to fix minimum rates for that class of contract carriers which operate in competition with common carriers over the highways of the State.

This point involves the real crux of this case. Petitioner's entire argument is dependent upon his present construction of the State statute. His counsel undertakes to presently construe the State statute as conferring unlimited and unconditional power upon the Commission to fix rates for contract carriers regardless of whether such contract carriers do or do not operate in competition with common carriers over the highways of the State (see pages 43-50 of his brief). He proceeds upon the theory that the Legislature of Texas decreed by legislative fiat that all contract carriers operated in competition with common carriers over the highways of the state and that both rendered substantially the same service. There has been a radical change in counsel's opinion upon this subject[1]. Nevertheless, counsel now take the contrary view. Their present position is grounded upon the language contained in the caption of the Act (see petitioner's brief, page 43), wherein the following is found:

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1 See undenied testimony of witness Colfix (R. 147-148); letter of Mr. T. S. Christopher to L. B. Colfix (R 149-151); and terms expressed in supplemental agreement (R 155-156)

"Giving to the Railroad Commission of the State of Texas power and imposing upon it the duty to fix, prescribe or approve maximum or minimum or maximum and minimum rates, fares and charges for motor carriers doing business as common carriers, and minimum rates, fares and charges for motor carriers operating as contract carriers."

Proceeding upon this assumption, it is then asserted that the language found in Section 6-aa[2] constitutes a legislative finding that all contract carriers operate in competition with common carriers over the highways of the state and perform substantially the same service. This notwithstanding the fact that the Legislature defined the term "contract carrier" (subd. [h][3], Sec. 1, *Article 911b)* as meaning any motor carrier transporting property for hire over the highways of the state other than as a common carrier. The term "motor carrier", in Subd. (g)[4], Sec. 1, Article 911b, is defined to be anyone owning, controlling, managing, operating or causing to be operated any motor-

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2 "Sec. 6aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

3 Subd. (h): "The term 'contract carrier' means any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier."

4 Subd. (g): "The term 'motor carrier' means any person, firm, corporation, company, co-partnership, association or joint stock association, and their lessees, receivers or trustees appointed by any Court whatsoever owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided, that the term 'motor carrier' as used in this Act shall not include, and this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns."

propelled vehicle used in transporting property for compensation or hire over any public highway in this state. All private motor operations are included within the definition of contract carriers. *Texas and Pacific Ry. Co. v. Railroad Commission et al.*, 138 S. W. (2d) 927, 930. Obviously, there are many types of motor carrier service thus defined, which are substantially different from common carrier service and which are in nowise competitive. A farmer who incidentally hauls his neighbor's cow to market for hire in a farm truck is a contract carrier, regardless of the point of origin, the point of destination or the route traveled, but his service cannot be said to be competitive with common carriers nor substantially the same. There are many types of private transportation which do not compete with common carriers and which are not substantially the same. The evidence here showed and the jury found (R. 80) that petitioner's operations were not in competition with common carriers over the highways of the state and that the services performed by him were not substantially the same services as those rendered by common carriers. The Legislature, in the enactment of Section 6-aa of the Motor Carrier Act, recognized the difference between contract carrier operations. It recognized that some contract carriers were competitive with common carriers and that the services performed were substantially the same, and that competition did not exist between others. The power of the Commission to regulate rates was specifically confined to that class of contract carriers who operate in competition with common carriers. The language of Section 6-aa is too plain to require construction. The Commission is authorized to prescribe rules

and regulations covering the operation of contract carriers in competition with common carriers and to prescribe minimum rates *for such contract carriers.* The expression of the one condition which must be present to authorize the Commission to act with respect to rates under the maxim *expressio unius est exclusio alterius* excludes the power, absent the existence of the condition. *Red River National Bank et al.* v. *Ferguson et al.*, 109 Texas 287, 295. The Supreme Court of Texas, applying this rule of construction in the cited case, said:

> "The Act, as has been stated, by implication, authorizes the wife, when joined by her husband, to become the joint maker of a note of another and a surety upon another's bond or obligation. This was the conferring of an original power—one with which she was not theretofore invested. In such cases the maxim, *expressio unius est exclusio alterius,* has marked application. Sutherland on Statutory Construction, sec. 491. It excludes any authority under the Act for her joining in her husband's obligations or becoming his surety."

It is impossible for us to read into this language a legislative fiat to the effect that all contract carriers operate in competition with common carriers. The language is certainly not susceptible to any such construction. Our construction of Section 6-aa is directly sustained by the Austin Court of Civil Appeals in *Texas and Pacific Ry. Co.* v. *Railroad Commission et al.*, 138 S. W. (2d) 927, 930, wherein it is said:

> "Contract carriers, a distinct and separate class from common carriers, must obtain a 'permit' to operate as

such. Sec. 6 prescribes the requisites of an application therefor and Sub. (3) (c) of that Section forbids the granting of such permit if operation thereunder 'will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory.' *And where authorized contract carriers operate in competition with common carriers the Commission must prescribe minimum rates, fares and charges for such services which must not be lower than those prescribed for common carriers for substantially the same service. See Sec. 6aa.*" (Emphasis ours.)

There is no Texas case to the contrary. Every private carrier, regardless of the nature of his service, must obtain a contract carrier permit and comply with the provisions of the Act and the rules and regulations of the Commission designed to promote safety upon the highways of the state and to preserve the highways against damage. Each private contract carrier must post a bond, file an application for a permit, not overload, and comply with the safety regulations. The Commission is not authorized to grant a permit which will impair the efficient public service of any authorized private carrier or contract carrier. But the Commission is only authorized to fix minimum rates for that class of contract carriers which operate in competition with common carriers. The minimum rates thus prescribed must not be lower than those fixed for common carriers performing substantially the same service. The power only exists where there is competition. The yardstick for the exercise of that power is that the minimum rates prescribed pursuant to the power delegated shall not be less than rates prescribed for common car-

riers performing substantially the same service. Our construction of the Act is not contrary to, but in accordance with, the construction this Court placed upon the Act in *Stephenson v. Binford*, 287 U. S. 251, 273, 274, 77 L. Ed. 288. The point here involved was not involved in *Stephenson v. Binford*. In that case a motor carrier refused to obtain a permit, as he was obviously required to do, and sought to enjoin the law enforcement agents of the state from enforcing the Act against him. This Court held that the Legislature of Texas had the constitutional right to require a person thus situated to obtain a permit to operate a motor vehicle over the highways of the state for hire. By analogy, the case of *Stanaland et al. v. Traders & General Insurance Co.*, 195 S. W. (2d) 118 (Tex. Civ. App.), is in point. This case involved the Texas Compensation Act. Section 8a, Article 8306, Compensation Act, provides in part as follows:

> "The compensation provided * * * shall be for * * * dependent grandparents, dependent children, and dependent brothers and sisters of the deceased employee; * * *."

Construing this section the Court in the cited case said:

> "The claim of Mrs. Stanaland falls under the 'dependent brothers and sisters of the deceased' classification of relationships; *and one of the questions to be decided is whether at the time of the death of Ed Miller the facts showed Mrs. Stanaland was a dependent of his within the meaning of the foregoing provision of Section 8a.*" (Emphasis ours.)

The language used in the caption of the Motor Carrier Act is broader than the language used in the enact-

ment and does not express the limitations upon the rate-making powers of the Commission over contract carriers found in the Act itself. For that matter many of the essential provisions of the Act are not undertaken to be set forth in the caption. Regardless of this, however, the language of the enactment controls over the caption. The caption is no part of the enacting clause. The caption may be looked to in aid of construing doubtful language in an enactment, but where the language of the enactment is clear, as here, the language in the enactment cannot be added to by the title or caption. *Red River National Bank* v. *Ferguson et al.*, 109 Texas 287, 294. The following is taken from the opinion of the Supreme Court of Texas, at page 294:

> "But the title, of itself, has no enacting force, and can not confer powers not mentioned in the Act."

See also *Felton* v. *Johnson*, 247 S. W. 837 (Tex. Com. App.); *Strathearn Steamship Co.* v. *Dillon*, 252 U. S. 348, 354, 355, 64 L. Ed. 607; *Lapina* v. *Williams*, 232 U. S. 78, 91 and 92, 58 L. Ed. 515.

This Court, in *Strathearn Steamship Co.* v. *Dillon*, *supra*, said:

> "But the title of an act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in case of doubt" (Page 354, Volume 252 U. S.).

The history of this legislation fortifies our position.

The first enactment of the Texas Legislature in 1929 undertook to convert all private carriers into common carriers. *Texas and Pacific Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 929 and 930. But in the 1931 enactment (911b), repealing the 1929 enactment, the Texas Legislature dealt separately with contract and common carriers and confined the ratemaking powers of the Commission over contract carriers to a narrow, conditional and limited field. This was doubtless due to the holdings of this Court in *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101, and *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264. No doubt the Texas Legislature felt the ratemaking provisions of the Act would be valid if extended only to contract carriers operating in competition with common carriers under the constitutional doctrine laid down by this Court in the *Shreveport rate cases* and other allied cases[5].

It is also a well recognized rule that where the meaning of a state statute is subject to two constructions, one of which will render the statute violative of the Constitution and the other will not, the court will construe the statute in such a way as to make it conform with the Constitution. *City of Waco* v. *Landingham* (Tex. Sup.), 157

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5 **Houston, East & West Texas Ry. Co. v. U. S. et al., 234 U. S. 342, 58 L. Ed. 1341; George T. Simpson et al. v. David C. Shepard, 230 U. S. 352, 57 L. Ed. 1511.**

S. W. (2d) 631, 633[6]; *Arkansas Natural Gas Co.* v. *Arkansas Railroad Commission*, 261 U. S. 379, 383, 67 L. Ed. 705, 710; *Friedman* v. *American Surety Co. of N. Y.* (Tex. Sup.), 151 S. W. (2d) 570, 578. This statute is not of doubtful meaning, but if it were this Court certainly would not adopt the construction petitioner undertakes to place thereon, for in doing so the statute would be plainly violative of the national Constitution under the holdings of this Court in *Frost* v. *Railroad Commission* and *Smith* v. *Cahoon, both supra.*

B. The Commission did not fix rates applicable to the services rendered by Petitioner.

The rates sought to be applied here are those prescribed in Texas Motor Freight Class and Commodity Tariff No. 1-A, which tariff was promulgated by the Commission primarily for common carriers. This tariff superseded Tariff No. 1. By general order entered on August 22, 1931 (following the promulgation of Tariff No. 1), the Commission directed that:

> "all Contract Motor Carriers as hereinbefore defined be and they are hereby ordered to observe and apply as minimum temporarily and until further orders of this Commission, * * * the rates, ratings, rules and regulations heretofore prescribed or approved by this Commission for observance by Class 'A' Motor

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[6] The Supreme Court of Texas in **City of Waco** v. **Landingham**, *supra*, at page 633, said:

> "In this connection, we think it is a settled rule of statutory construction that where the language of a statute is broad enough to cover matters without, as well as within, the power of the Legislature to enact, courts should construe the statute in a restricted manner, as applying only to matters lying within the legislative power. This rule should be applied in all instances, unless the statute itself clearly indicates otherwise."

> Carriers, as shown in Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1, as amended" (R. 101).

Subsequently the Railroad Commission of Texas adopted Motor Freight Class and Commodity Tariff No. 1-A, which became effective June 26, 1940. Section 3 of this tariff provides for the application of the rates therein set forth. Item 470 prescribes that the rates, rules and regulations in the tariff shall be observed "by Contract Motor Carriers as minimum, on Texas Intrastate Traffic, unless permits issued by the Commission provided to the contrary" (R. 103).

It is the position of petitioner that because the permit issued to Steele (R. 99-100) did not provide that the rates prescribed in Tariff 1-A should not apply, such rates so prescribed automatically were applicable. It is also his position that the reference contained in the order of the Commission (R. 96) as follows:

> "In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rates prescribed for common carrier motor carriers",

constitutes an order directly applying the tariff rates relied upon to the transportation services here involved. We submit these contentions are untenable. Tariff 1-A, prescribing rates for common carriers, is not applicable because the service performed by petitioner under the evidence and the special verdict was not substantially the same as the services performed by common carriers. Hence the tariff prescribes a rate for a different kind and char-

acter of service than that performed by petitioner. The Commission was without power under the legislative grant of authority to fix a blanket minimum rate applicable to all contract carriers. It was necessary for the Commission to consider each application for a permit on its own merits, to determine if the proposed operations thereunder were competitive with common carriers, and if the services to be performed were substantially the same as those performed by common carriers. Therefore it must of necessity be presumed that the Commission, in the rules set forth in Item 470, Section 3, Tariff 1-A, of date June 26, 1940, intended that the tariff should be observed by contract carriers as a minimum when such contract carriers operated in competition with common carriers and performed substantially the same service. It cannot be assumed that the Commission intended to exceed its authorized statutory powers and violate statutory directions. The provision in the general order of August 22, 1931, cannot be construed as applying Tariff No. 1-A, effective June 26, 1940, to the operations here involved, because the order of August 22, 1931, related to Tariff No. 1, which was superseded by Tariff 1-A. The reference in the order (R. 96) is insufficient of itself to constitute an order making the tariff applicable. This reference must be considered in connection with the tariff itself and evidences only the attitude of the Commission if the operations became competitive with common carriers and the services performed substantially the same as those performed by common carriers. In other words, the Commission pointed out a guide to petitioner in event the contingency mentioned should arise during the course of operations. The jury found

neither contingency arose. It must be further remembered that Tariff 1-A, and the rules and regulations therein set forth, were in effect long before the execution of the original or supplemental agreement here involved. The permit was issued and the order of the Commission (R. 94-96) was entered prior to the execution of the supplemental agreement (R. 155-159). In this contract, it was specifically agreed by the parties that the Railroad Commission of Texas had not fixed any rates, charges or tariffs for the kind and character of service to be rendered by petitioner for respondent. It is inconceivable how petitioner can now contend that the Railroad Commission of Texas did in fact fix rates when, subsequent to the permit and orders now relied upon, and with full knowledge thereof, petitioner in writing agreed that *no rates, charges or tariffs were prescribed by the Commission for the services to be rendered by petitioner.* It is submitted that the Record in this case wholly fails to disclose that the tariff relied upon by petitioner was ever made applicable by the Commission to the transportation services involved. On the other hand, the Record affirmatively discloses to the contrary. Petitioner having been fully paid in accordance with the terms of his contract, the judgment of the Circuit Court of Appeals is correct.

C. If it be assumed that the Commission undertook to make Tariff 1-A applicable to the services performed by petitioner, the action of the Commission is void.

The point here presented is whether the Commission had lawful power to fix rates for the transportation services here involved, absent a finding of competition and

absent competition in fact. It is not a question of whether possessed power *was improperly exercised*. With this distinction in mind, the authorities cited by petitioner are readily distinguishable. Judicial inquiry into the *power* of an administrative body is always proper. Presumptions of regularity only exist where power to regulate is unquestioned. For instance, this Court, in *Pacific States Box & Basket Co.* v. *White et al.*, 296 U. S. 176, 80 L. Ed. 138, quoted from in petitioner's brief, at pages 39 and 40, said:

> "Where the regulation is by an order of an administrative body, that body acts under a delegation from the Legislature. The question of law may, of course, always be raised whether the Legislature had power to delegate the authority exercised" (Page 186, 296 U. S.).

If the point had been involved in *Pacific States Box & Basket Co.* v. *White, supra*, this Court doubtless would have made the further announcement that the existence and extent of the delegated power was also a proper question for judicial review. This Court did say:

> "But where the regulation is *within the scope of authority legally delegated*, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and *to orders of administrative bodies*" (Page 186, 296 U. S.). (Emphasis ours.)

Conversely, this presumption will not apply where the regulation is *not* within the scope of authority legally delegated.

Also in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 80 L. Ed. 1033, quoted from at page 41 of peti-

tioner's brief, this Court announced that the presumption of constitutionality prevailed where the act of a legislative body was "within the scope of its power" (288 U. S., at page 83).

Petitioner also relies on *Spence* v. *State National Bank*, 5 S. W. (2d) 754, which is quoted from at the top of page 42 of his brief. It is merely held in the *Spence case* that where general jurisdiction over subject matter exists a failure to observe the requirements of a procedural statute does not render a judgment void.

Security Trust Co. of Austin v. *Lipscomb County*, 180 S. W. (2d) 151, another case relied upon by petitioner and quoted from at pages 42 and 43 of his brief, deals with the validity of a judgment rendered by a court in a controversy *within the scope of its general jurisdiction*. It was a case in which the court "had authority to decide this question either rightly or wrongly." Having the authority to decide the question, the validity of the court's judgment as against collateral attack did not depend upon whether the decision was right of wrong. In *Railroad Commission* v. *Rapid Transit Co.*, 92 S. W. (2d) 261, cited and quoted from at page 44 of petitioner's brief (quoting from the opinion):

> "The order was one which the commission *had authority to make* and was therefore presumptively valid." (Emphasis ours.)

The same rule was recognized by this Court in *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. Ed. 510, quoted from at page 48 of petitioner's brief. There the Commission was purporting to act under authority legally delegated. In fact, this Court examined the legisla-

tive act for the very purpose of determining if it conferred the power exercised by the Commission and, after holding the act conferred the exercised power, struck down the Act because violative of the Fourteenth Amendment to the Federal Constitution in a collateral proceeding initiated in the Western District of Texas.

The order of the Commission involved in *United States* v. *Berwind-White Coal Mining Co.*, 274 U. S. 564, 71 L. Ed. 1204, was within the legislative grant of power. It was claimed that the findings of the Commission upon the issue of discrimination were unsupported by evidence. There was simply involved the exercise of power and not the issue of lack of power. We have previously demonstrated that the Railroad Commission of Texas does not exercise general and unlimited power over rates of contract carriers. The Commission under the Texas Act only exercised conditional power over such rates and may not exercise this power at all *absent competition between the contract carrier and common carrier over the highways of the state*. Unless competition is shown the Commission may not fix rates, either rightly or wrongly. If it is made to appear that competition exists between the operations of a contract carriers and common carriers over the highways of the state, then it might be presumed, absent facts to the contrary, that the minimum rate fixed by the Commission for the contract carrier was the same as the rate for common carriers performing substantially the same service. But the existence of the condition which is necessary and precedent to any authority at all will never be presumed in the absence of a finding of the Commission or facts *aliunde* the record. Jurisdictional facts are not

presumed merely from the Act itself. *Cunningham* v. *Robison*, 136 S. W. 441; *Geffert* v. *Yorktown Independent School District*, 290 S. W. 1083; *Willis* v. *First Real Estate & Invest[illegible] Co. et al.*, 68 Fed. (2d) 671; *Cline* v. *Niblo*, 117 Texas 474, 8 S. W. (2d) 633; *State Line Consolidated School District* v. *Farwell Independent School District*, 48 S. W. (2d) 616; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446.

The orders and proceedings before the Commission, introduced in evidence, construed most favorably to petitioner, were silent upon these two issues of fact inquired into by the trial court. The finding of the Commission quoted from at pages 37 and 38 of petitioner's brief (R. 96) as follows:

> "The Commission, after carefully considering the evidence, the laws, and its own rules and regulations, is of the opinion that the character of business proposed to be done by the applicant strictly conforms with the definition of a contract carrier";

is certainly not a finding that the proposed operations of petitioner were competitive with the operations of common carriers over the highways of the state. Under the statutory definition every private carrier is a contract carrier. The reference to the Commission's tariffs (R. 96) as follows:

> "In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rates prescribed for common carrier motor carriers";

is in no sense a finding of the existence of facts authorizing the Commission to exercise its conditional ratemaking power. In fact, the order as a whole (R. 94-98) finds facts which in themselves show lack of competition rather than the existence of competition. The permit itself is silent upon the subject. The trial court submitted both issues of fact to the jury and the jury, by special verdict, found that petitioner's operations were not competitive with common carriers over the highways of the state and that the services performed by him were not substantially similar to those performed by common carriers. The special verdict, as previously stated, was not set aside but allowed to stand and is conclusive upon the facts in this case. *Cline* v. *Niblo*, 117 Texas 474, 8 S. W. (2d) 633, by the Supreme Court of Texas, is in point. The Constitution of Texas confers upon the county courts exclusive original jurisdiction over estates of deceased persons. The effect of the constitutional provision is to confer upon county courts the general power to administer the probate law in accordance with legislative enactments. The homestead of a deceased person may not be sold to satisfy creditors of the deceased if a widow or minor child survives. In the cited case of *Cline* v. *Niblo*, the County Court, in the exercise of its probate jurisdiction, entered an order directing the sale of certain property for the purpose of satisfying claims of creditors which had been allowed by the Probate Court. The order of the Probate Court was silent with respect to whether the property was the homestead of the deceased and with respect to whether minor children survived. A direct appeal was not taken to the District Court as authorized by the Texas probate laws. The property was

sold pursuant to the order of the Probate Court and purchased by Cline for value. Thereafter the purchaser's title was attacked in a collateral proceeding by the heirs of the deceased. The question was squarely presented to the Supreme Court of Texas whether in such a proceeding the court was warranted in determining if the real estate was the homestead of the deceased, if minor children or an unmarried daughter survived the deceased, and if facts existed justifying the Probate Court to order the sale of the homestead. The Record in the Probate Court was silent with respect to these elements. The Supreme Court answered this question in the following language:

> "If the probate records show that the court has attempted to exercise a power which it does not have, the judgment is void on its face, amounts to nothing, and may be disregarded in any forum. Freeman on Judgments (5th Ed.), pars. 382, 395. In cases, however, where the vice in the decree does not appear on its face, and the judgment does not show that the homestead question has been adjudicated, the courts permit the true facts to be shown and the invalidity of the decree to be established aliunde the record. (8 S. W. (2d) at page 632.)

The decision of the Supreme Court is grounded upon the rule that even though a court may have jurisdiction over the parties and the property, such court must also have the power to enter the kind of order, judgment or decree that was entered.

A very similar question was decided by the Commission of Appeals of Texas, acting for the Supreme Court, in the case of *State Line Consolidated School District* v. *Far-*

well Independent School District, 48 S. W. (2d) 616, from which we quote:

> "It is true that our laws provide in certain instances that the orders and proceedings of county school boards can only be questioned by appeal to higher school authorities, but, when a school board acts without authority of law and contrary to express statute, and in such a manner that its act is void, then the courts of the land may be appealed to directly without first exhausting the remedy of appeal through the school authorities. *County School Trustees of Jackson County* v. *Edna Independent School District* (Tex. Com. App.), 34 S. W. (2d) 860; *Brockman* v. *Echols* (Tex. Civ. App.), 22 S. W. (2d) 686; *Collin County School Trustees* v. *Stiff* (Tex. Civ. App.), 190 S. W. 216 (writ ref.); *Freeport Independent School District* v. *Common School District*, 115 Tex. 133, 277 S. W. 97; *Henderson* v. *Miller* (Tex. Civ. App.), 286 S. W. 501 (writ ref.).
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> *"In connection with the above we hold that the county board of trustees is an administrative body with certain defined powers and duties. It can only exercise such powers and perform such duties as are expressly defined by statute, or necessarily implied therefrom* (48 S. W. (2d) at page 617). (Emphasis ours.)

The laws of Texas confer upon District Courts the power to remove disabilities of minority where the minor resides in the county of the district in which the petition is presented and where he is over nineteen years of age. The jurisdiction of the District Court is thus limited and conditional. The Supreme Court of Texas, in *Cunningham* v. *Robison*, 136 S. W. 441, held that an order of the District

Court undertaking to remove disabilities of a minor was void where it failed to appear from the order or from the record that the minor resided in the county where the petition was presented and was over nineteen yars of age. The Court held the order was subject to a collateral attack in another proceeding and was not (p. 441) entitled to the presumption of verity, especially as to the jurisdiction of the court, as would be the case where the function performed was that of the ordinary judicial powers of the court. The Commission of Appeals of Texas in another case, *Geffert* v. *Yorktown Independent School District*, 290 S. W. 1083, referring to the taxing power of a school district, held:

> "In a case like this of limited jurisdiction, where the right of the tribunal to proceed at all depends upon the existence of a given fact or the doing of a specific act, such fact or act is jurisdictional and precludes any further proceeding until it is shown to exist or to have been performed, as the case may be. The proceedings of such special tribunals, like inferior courts not of general jurisdiction, are not entitled to the presumptions of regularity usually attaching to official acts, until their jurisdiction—their right to act at all—is first affirmatively shown." (290 S. W. at 1084.)

Anderson, Clayton & Co. v. *Allred*, 62 S. W. (2d) 107 (Texas Com. App.), involved the Texas Motor Carrier Act. The Railroad Commission was attempting to regulate trucks of Anderson, Clayton & Company under the provisions of the Act. It was held that the court in a collateral proceeding could determine if the operations of Anderson, Clayton & Company came within the legislative definition

of contract carriers for hire so as to be subject to the provisions of the Texas Motor Carrier Act.

The Supreme Court of Texas in the recent case of *Cobb et al.* v. *Harrington et al.*, 190 S. W. (2d) 709, held that a court in an independent action for declaratory judgment may determine if operators of trucks are subject to the Motor Carrier Act, notwithstanding Section 20 of the Act, permitting appeals from orders of the Commission to the District Court of Travis County.

It has been held by this Court, in cases arising under the full faith and credit clause of the federal Constitution that it is always proper for a court in another state to inquire into the power or jurisdiction of the court of a sister state to render the judgment sought to be enforced. *Cole* v. *Cunningham*, 133 U. S. 107, 33 L. Ed. 538.

Petitioner was a private carrier. The permit under which he operated authorized him to haul only for respondent. The contract under which he operated likewise required him to haul exclusively for respondent according to its requirements. No question of public interest is here involved in the rates charged by petitioner and paid by respondent under the private contract of carriage. A contract carrier who hauls for only one customer cannot be guilty of discrimination in the matter of rates. He had no other customer in whose favor he could discriminate. The rights of common carriers are not affected because the operations were not competitive and the services performed by petitioner were not similar to those performed by common carriers. If it be assumed that the Commission

under these circumstances undertook to make Tariff 1-A applicable to the services performed by the petitioner, the action of the Commission is void. The provision with respect to application of rates contained in Tariff 1-A, effective June 26, 1940, if construed as an order applying such tariff to the transportation services here involved, is void on its face because the order was entered long before petitioner's application was filed and is a general order applicable to all contract carriers, without reference to the character of operation or services to be performed by a particular carrier. It was never contemplated by the Legislature of Texas under Article 911b that such an order would comply with the requirements of the statute. Furthermore, in no event is the tariff effective until the permit is issued, for the permit might well provide otherwise with respect to rates. If, as contended by petitioner, the failure of the permit to make other provisions with respect to rates and the reference to the tariff contained in the order constituted an effort on the part of the Commission to apply the tariff rates to the services to be performed by petitioner under the permit, the permit and the order are each void on their faces to the extent that either of them constitutes a ratemaking order because of the failure of the Commission to find, there or elsewhere in the Record, that the operations of petitioner under the permit are or would be competitive with common carriers over the highways of the state. The actions of the Commission also are void under the facts as found by the jury in its special verdict. The jurisdictional facts, the presence of which is necessary to authorize the Com-

mission to exercise the limited and conditional ratemaking power granted by the Legislature, do not appear in the order or findings of the Commission or elsewhere in the Record. On the contrary, the facts as found by the jury are affirmatively to the contrary. Even if a Commission exercises general and unconditional power, findings of fact justifying the exercise of such power must be made where the act authorizing the use of power requires such findings. *Wichita R. R. & Light Co. v. Public Utilities Commission of the State of Kansas*, 260 U. S. 48, 58, 59, 67 L. Ed. 124.

Article 911b, Section 12a, expressly requires the Commission, along with its order, to file a "concise written opinion, setting forth the facts and grounds for its action," in all instances where the application is contested. The Record conclusively discloses that the application of petitioner for a permit was a contested application. So if the Commisison did in fact undertake to fix rates, it was required under the express provisions of the Act to file findings justifying its action. The Commission did render an opinion and make findings (R. 94-98),[7] but there is no finding justifying the Commission in fixing rates. On the other hand, the facts found are to the contrary. So, regardless of the nature of the power conferred upon the Com-

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7 Such findings would have been unnecessary had not the proceedings been contested. The Commission's order recites the application came on for hearing after due notice to all interested parties. The order shows that testimony contrary to the application was introduced before the Commission; the order shows the application was granted in part and denied in part and provided for exceptions to be filed. The partial transcript of petitioner's testimony before the Commission (R. 234-238) shows the hearing was a contested one and that a Mr. Smith appeared and interposed certain objections to petitioner's testimony

mission, its ratemaking order (if construed as such) is void on its face because of the lack of necessary findings. Also see *T. & P. Ry. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 932. But here it conclusively appears from the legislative enactment itself that the Commission exercised only conditional and limited power over contract carrier rates. Therefore, even without statutory requirements, it must appear from the order of the Commission or at least from the record that the prerequisite facts justifying ratemaking powers exist. Otherwise the order is void on its face.

D. The Collateral Attack rule has no application.

The Commission is only empowered to fix minimum rates in instances where a contract carrier is operating in competition with common carriers over the highways of the state. *Section 6aa, Article 911b, supra.* In order to invoke the limited and conditional power granted the Commission it must appear either from findings of the Commission, supported by evidence, or by evidence *aliunde* the Commission record, where an order of the Commission is sought to be enforced, that the jurisdictional facts authorizing the ratemaking order are present. *Cline* v. *Niblo*, 117 Texas 474, 8 S. W. (2d) 633 (Sup. Ct. of Texas); *State Line Consolidated School District* v. *Farwell Independent School District*, 48 S. W. (2d) 616 (Tex. Com. App.) *Cunningham* v. *Robison*, 136 S. W. 441 (Tex. Sup. Ct.); *Geffert* v. *Yorktown Independent School District*, 290 S. W. 1083 (Tex. Com. App.) Absent both a finding of the Commission and

evidence *de hors* the Record, the order is utterly void under the cases above cited. Where, as here, the Commission acted without authority of law, the appeal statute *(Section 20, Article 911b)* has no application. The mere fact the Commission acted does not carry with it a presumption of regularity or verity which usually follows an order or judgment of a court of general jurisdiction. Speaking of the existence of facts empowering the Probate Court to decide a question, the Supreme Court of Texas, in *Cline* v. *Niblo*, *supra*, said:

> "If the record shows that the questions whether or not the property was homestead, or that the debts involved were chargeable against a homestead, then these issues, other requisites being present, are foreclosed, except upon direct attack upon justiciable grounds. Freeman on Judgments (5th Ed.), pars. 350, 372, 378, 379. But if these questions do not appear to have been adjudicated, the conclusive presumption of their involvement and determination does not obtain, and the real facts may be shown in another forum. This rule of law rests upon a sound basis." (Page 485, 117 Texas.)

The laws of Texas provide for special appeals from orders of a county school board in much the same manner as provided for under Section 20 of the Motor Carrier Act. Nevertheless, the Texas Commission of Appeals, acting for the Supreme Court of Texas, in the case of *State Line Consolidated School District* v. *Farwell Independent School District*, 48 S. W. (2d) 616, *supra*, specifically held:

> "As long as such board acts within lawful limitations its judgment and discretion can only be ques-

tioned by appeal to higher school authorities, but, when it goes outside its statutory limitations and acts without authority of law, its acts are void and may be questioned in a court action without the formality of an appeal to the higher school authorities." (Page 617, 48 S. W. [2d]:)

The Commission of Appeals in a case involving an assessment or order of an independent school district, *Geffert* v. *Yorktown Independent School District*, 290 S. W. 1083, *supra*, said:

> "*It will not do to say that this precedent fact necessary to give jurisdiction may be shown by the subsequent acts of the tribunal in harmony with its existence*, since this would be to attach to such subsequent proceedings the quality of official acts and the consequent force of evidence by way of raising a presumption of authority or power. *Such authority—in other words, jurisdiction—cannot be presumed from anything. It must be proved as any other fact is proved.*" (Page 1085, 290 S. W.) (Emphasis ours.)

District Courts of Texas are ordinarily courts of general jurisdiction but exercise special and limited jurisdiction over certain subjects. District courts may in certain instances remove disabilities of minority but may exercise this jurisdiction only in cases where the minor seeking to have his disabilities removed is over nineteen years of age and presents his application in the district court of the county where he resides. The Supreme Court of Texas, in *Cunningham* v. *Robison*, 136 S. W. 441, held that in such proceedings an order of a district court "is not entitled to the presumption of verity, especially as to jurisdiction of the court, as would be the case where the function per-

formed was that of the ordinary judicial powers of the court." (Page 441, 136 S. W.) Further, the Court said:

> "The statute of this state herein copied above confers special jurisdiction upon the district court to remove the disabilities of minors 'over the age of nineteen,' and the jurisdiction is conferred upon the district court of the county in which 'he may reside.' It is apparent from this language that the two facts—that the minor is over 19 years of age and that he resides in the county in which the proceeding is had—are jurisdictional in their character, and must be made to appear in the record in order to sustain the action of the court in exercising that power. A district court has no authority to remove the disabilities of a minor under 19 years of age. Therefore it must appear that such minor is over 19 years of age at the time. Such court has no jurisdiction except over such minors as may reside within the county in which the court is held. Therefore, in order to give jurisdiction, it must appear that the minor resided in the county where the court that made the order was held. Neither of these facts appear in the record as presented to this court, nor, indeed, are they alleged in the pleadings of the relator in this court. Whether this court will permit the proof of such fact outside the record is not presented to us, and we do not pass upon that question." (Page 442, 136 S. W.)

It does not appear from the proceedings before the Commission or from the orders of the Commission that the jurisdictional facts authorizing the Commission to fix rates were present. The Commission made no finding of the existence of such jurisdictional facts. Furthermore, the Motor Carrier Act itself, *Section 12, Article 911b,* re-

quires the Commission, with respect to all contested hearings, to "file a concise written opinion setting forth the facts and grounds for its action * * *." It must be conceded that the record in this case shows petitioner's application was contested. In fact, it is virtually conceded in petitioner's brief that Section 12 applies (brief, page 37). The Commission undertook to comply with the requirements of Section 12a of the Motor Carrier Act and did file a written opinion setting forth the grounds for its order (R. 94 to 98). The findings therein contained do not show that the requisite jurisdictional facts existed to authorize the Commission to fix rates. The facts found by the Commission in the order and opinion negative rather than confirm the existence of such jurisdictional facts. The jury in the trial court by its special verdict, supported by evidence, expressly found that the operations of petitioner under his contract with respondent were not in competition with common carriers over the highways of Texas (R. 80). It therefore does not appear, either from the proceedings before the Commission, the orders of the Commission or from the record in the trial court, that the jurisdictional facts authorizing the Commission to fix rates at all existed. On the other hand, the contrary appears. The question here involved is not whether the Commission erroneously decided a question which, in the language of the Supreme Court of Texas, it "had authority to decide—either rightly or wrongly" (*Massachusetts* v. *Davis*, 140 Texas 398, 405, 168 S. W. [2d] 216, 220; *Security Trust Company of Austin* v. *Lipscomb County*, 180 S. W. [2d] 151). Nor is it a case in which a court under the evidence is authorized to say

an object be black or white, such as the question discussed by the Supreme Court of Texas in *Land Company* v. *McClelland Bros.*, 86 Texas 179. On the other hand, under the record before this Court, the Railroad Commission was not authorized by law to fix *any rates or charges* for the transportation services. If the question presented was one in which the Commission was authorized to act and the complaint was that the rate fixed was too high or too low, or was discriminatory or was otherwise erroneous, then petitioner's petition with respect to collateral attack and the duty of an aggrieved party to pursue the remedy prescribed under Section 20 of the Motor Carrier Act would probably be correct.

The authorities cited by petitioner beg the point and support rather than decide against respondent. All of the cases cited involve attacks upon orders of regulatory bodies or judgments of the court *entered pursuant to legal authority*. The cases involve the question of whether the delegated authority was exercised rightfully or wrongfully. The complaint in *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 73 L. Ed. 390 (cited by petitioner), instituted an equity proceeding in the United States District Court to enjoin the Railroad Commission of Kentucky from establishing an alleged confiscatory rate, and to prevent complainant from withdrawing its service in certain communities. The complainant insisted that the order of the Commission was void because (1) confiscatory under the federal Constitution, (2) was not supported by findings of the Commission, and (3) that the Kentucky Legislature had not validly created the Commission under

the laws of Kentucky. With respect to the last objection, this Court held that the complainant had invoked the powers of the Commission to obtain a franchise and could not therefore assail the state statute creating the Commission (278 U. S. 307, 308). This is a familiar rule of law but has no application here. The power and authority of the Commission was then assumed and upon such assumption the Court held that complainant could not complain of the failure of the Commission to make findings in support of its order (power to make the order being present) in the absence of a showing that the rates fixed by the Commission were confiscatory (278 U. S. 310, 311). It was then held that confiscation was not shown and the order of the Commission was sustained. The power of the United States Court in a collateral proceeding to review the order of the Commission was sustained by this Court rather than denied.

In *Thompson* v. *Consolidated Gas Utilities Co.*, 300 U. S. 55, 81 L. Ed. 510, an equity proceeding for injunction in the United States Court, the petitioner complained of an order of the Railroad Commission on two grounds: First, that the legislative enactment did not confer authority upon the Commission to make the order and, second, that the legislative enactment was violative of the United States Constitution. The United States District Court assumed jurisdiction of the case and held the legislative enactment did not authorize the order of the Commission complained of in that suit. This Court disagreed with the lower court's construction of the power granted the Commission by the state law and construed the legislative en-

actment to delegate the power exercised by the Commission. The legislative enactment thus construed was held violative of the federal Constitution (300 U. S. 75). The judgment of the lower court was affirmed but upon a ground different from that on which the lower court predicated the judgment. This holding is squarely against the collateral attack contention here presented by petitioner, for this Court in a collateral proceeding did construe the legislative enactment for the purpose of determining if the order complained of was authorized thereby. This Court did use the language quoted from by petitioner at page 48 of his brief but qualified that language with this conclusion:

> "But, obviously, the proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights, or if shown to be otherwise arbitrary." (Pages 69 and 70, 300 U. S.)

Notwithstanding the fact that the order of the Commission in the case last referred to was entered pursuant to delegated power, it was held to be void on the facts in a collateral proceeding. Under this Court's holding we are clearly entitled to test the power of the Commission to enter the alleged ratemaking order complained of in a proceeding in which petitioner seeks to enforce that order. *Greer* v. *Railroad Commission of Texas*, 117 S. W. (2d) 142, does not sustain petitioner's contention. The order of the Commission was attacked in the *Greer* case on two grounds: (1) That it was passed without notice or hearing; and (2) that it was unjust, unreasonable and discriminatory. The

Commission admittedly had jurisdiction over the subject matter of the order. The court held the order complained of was a general order and that notice and hearing were not required under the statute. On the other hand, the Court held:

> "Where the statute requires notice and hearing, such prerequisite is jurisdictional, and its omission renders the order void." (Page 145, 117 S. W. [2d].)

The holding of the Court in that case, which is here relied upon by petitioner was predicated upon the fact that the order complained of was not void and was entered pursuant to authority delegated by the Legislature. The portion of the opinion of the Court quoted from by petitioner, at pages 51 and 52 of his brief, therefore has no application.

Alpha Petroleum Co. v. *Terrell*, 59 S. W. (2d) 364, quoted from by petitioner at page 53 of his brief, merely holds that a statutory appeal from a rule of the Commission is necessary where the rule is valid on its face and *promulgated under the terms of the authority delegated by the Legislature*. This appears from the face of the very quotation from the opinion of the Court set forth at page 53 of petitioner's brief.

Likewise the order of the Commission complained of in *Producers Refining Co.* v. *Missouri-Kansas-Texas Ry. Co.*, 13 S. W. (2d) 679, quoted from at pages 53 and 54 of petitioner's brief, was one entered pursuant to authority delegated to the Commission and the subject matter of the order was within the jurisdiction conferred upon the Com-

mission. This being true, it was immaterial whether the Commission exercised general or limited jurisdiction.

Mingus v. *Wadley*, 285 S.W. 1084, quoted from at page 54 of petitioner's brief, has no possible application. The complainant in this case sought to enforce a special statutory right not recognized at common law. The statute granting the right defined the remedy and named the court in which the remedy might be enforced. The Court merely held that complainant was required to enforce the statutory rights in the method defined by law.

Texas Steel Co. v. *Fort Worth & Denver*, 40 S. W. (2d) 78, is quoted from at length in petitioner's brief, at pages 55 and 56. The Steel Company in that case complained of certain railroad common carrier rates fixed by the Commission. The Commission exercises general and not limited jurisdiction with respect to rates of common carriers by rail. The Court pointed out:

> "It is not contended that the orders of the Railroad Commission here collaterally attacked are void on their faces, or that the Railroad Commission was without inherent lawful jurisdiction to act in the premises." (Page 82, 40 S. W. [2d].)

The converse of this contention is true here. Respondent contends that the orders of the Commission here complained of, insofar as they may constitute ratemaking orders, are void on their faces, and that the Commission was without inherent lawful jurisdiction to act in this respect. It is well to note, in passing, that the orders complained of in the *Texas Steel* case were general orders and not special orders and the holding of the court in that case

to the effect that such orders were not void on their faces for want of notice must be read in the light of the holding in the *Greer* case, decided several years later, 117 S. W. (2d) 142, *supra*, to the effect that:

> "Where the statute requires notice and hearing, such prerequisite is jurisdictional and its omission renders the order void." (Page 145, 117 S. W. [2d].)

Burford v. *Sun Oil Co.*, 319 U. S. 315, 87 L. Ed. 1424, cited at pages 56 and 57 of petitioner's brief, has no application. This was an equity suit brought in the Federal Court in which an injunction was sought against the enforcement of an order of the Railroad Commission. Jurisdiction was invoked under the diversity of citizenship clause. Complainant invoked certain rights under the state law and also contended that the order of the Commission denied him due process of law in violation of the federal Constitution. This Court held that the United States Court for the Western District of Texas could not be vested with appellate jurisdiction by a state statute to review the correctness of a decision of the Railroad Commission (Page 319, 319 U. S.). It was held that a federal equity court did have jurisdiction under the diversity of citizenship clause to protect legal rights but that the instant case was not a proper one *in which to exercise such equitable jurisdiction*. Jurisdiction of the federal court was invoked by the party complaining of the order of the Commission. This is not a proceeding in equity in which respondent is undertaking to invoke the jurisdiction of the United States Court to set aside an order of the Railroad Commission. It is merely defending against the attempt of petitioner to en-

force an unlawful order against respondent in an action at law in the United States Court. Petitioner and not respondent chose the forum. Respondent is entitled to assert and have protected its legal rights in this proceeding.

It must also be remembered that respondent was not a party to the special proceedings before the Railroad Commission in which the special order granting the permit was entered and in which it is claimed the Commission undertook to apply common carrier rates to the services here involved. For this additional reason the collateral attack rule should have no application. *State Mtg. Corp.* v. *Traylor* (Tex. Sup.), 36 S. W. (2d) 440, 443; *Texas Soap Mfg. Co.* v. *McQueary* (Tex. Civ. App.), 172 S. W. (2d) 177, 180.

Respondent does not challenge the power of the Commission to grant Steele a common carrier permit nor does it question the fact that petitioner was a contract carrier as defined by the Texas Act. Under the Act petitioner was clearly required to obtain a permit in order to operate over the highways of the state. The Legislature was authorized to require such a permit. As an incident to granting the permit the Commission was authorized to require petitioner to post a bond, not overload, and otherwise comply with the safety regulations of the Act. The permit as such and the order granting it are not here attacked, except and unless such permit and order, because of their silence upon the subject of rates, be construed as impliedly applying the common carrier tariff rates to the services involved, and then only to this extent.

Petitioner is undertaking to enforce the Commission orders and permit as ratemaking orders and to recover the rates thus fixed. In order to recover it was necessary for petitioner to show that the Commission acted within the power delegated to it by law. Petitioner completely failed to sustain this burden. Under the record in this case the collateral attack rule has no application and the permit and the orders of the Commission to the extent that they may be construed as an act of the Commission applying common carrier rates to the services here involved are void.

E. Respondent was not a party to the proceedings before the Commission and did not invoke the jurisdiction of the Commission to fix rates.

Petitioner's argument that respondent, a Delaware corporation, is estopped to complain of the ratemaking order of the Commission (if there was one in this case) is founded upon the erroneous assumption that respondent voluntarily came into Texas and invoked the jurisdiction of the Railroad Commission to fix rates. In the first place, there is no evidence when respondent obtained a permit to do business in Texas. So far as the Record is concerned it may safely be assumed that the permit was granted long prior to the enactment of *Article 911b, Revised Statutes of Texas*. There is not one iota of evidence that respondent was a party to petitioner's application for a permit or that it had any knowledge of the contents thereof. The evidence is to the contrary (R. 141-142). As a matter of fact, the application for a permit was filed long

prior to the date the first contract was signed.[8] Respondent was not charged with notice of the gratuitous statement in petitioner's application for a permit that petitioner expected to charge the Railroad Commission rates, particularly since the law did not require such a statement to be made. *Article 911b*[9] The law *(Article 911b)* makes no provision for a shipper or contractee to apply for or obtain a permit. A permit is not required of the contractee or shipper and no provision is made for it to be a party to the proceedings for the permit. The motor carrier is the only proper person to apply for a permit and the only person to whom such a permit may be issued. Respondent was not issued and has never held a contract carrier's permit; the transportation involved here was not performed under any permit issued to respondent. Besides, petitioner's application to the Railroad Commission was for a permit; *not to have rates fixed for services to be performed.* Respondent knew or was charged with knowledge of the fact that the Commission could not fix minimum rates in the absence of competition between an applicant for a contract carrier's permit and common carriers over the highways of Texas. *Respondent knew and the parties agreed that such competition did not exist.* Respondent did not know at the time it contracted with petitioner and does not now believe that the Railroad Commission ever undertook to apply minimum rates to the

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8 Application for permit filed August 27, 1940 (R. 94); first contract not executed and delivered until after April 17, 1941 (R. 152-3).

9 The Act, subdivision 3, Sec. 10, Article 911b, requires an applicant for a certificate of public convenience and necessity to operate as a common carrier to file a proposed schedule of service and rates to be charged, but no such requirement is made in an application for a permit to operate as a contract carrier. Sec. 6, subdivision (a).

transportation services here involved. The parties hereto expressly agreed that no such rates were fixed by the Commission. It is true that the so-called original contract did contain a provision such as is quoted from at page 33 of petitioner's brief. The history relating to the manner in which this provision was inserted in the contract is stated in the majority opinion of the Circuit Court of Appeals and is found in the facts heretofore set forth in this brief. At the very time this provision was inserted in the original contract it was contemplated between the parties that it would be superseded by the provisions contained in the supplemental contract wherein it was expressly agreed between the parties that the Railroad Commission had not fixed rates, charges or tariffs for the kind and character of services to be performed under the contract (R. 156), and another standard was fixed for determining the compensation to be paid petitioner. The provisions of the supplemental agreement, as expressly found by the court below, constituted the one, only and real agreement between the parties. As stated by that court (R. 312-313):

> "There was but one contract that spoke the actual intent and agreement of the parties, and that was the amended contract under which all of the services were performed.
>
> "Appellee says that this provision in the supplemental contract for the payment of Steele is void, and he ignores the fact that it is a part and parcel of the only contract on which he can declare. A contract modified before there was any performance takes the place of the original one, and consists of the new terms and any provisions of the original contract which the parties agree shall remain unchanged."

The supplemental and amended contract was entered into before any services were performed, and all services were performed by Steele under such amended or supplemental agreement. Obviously, the statement made by petitioner at page 34 of his brief, to the effect that respondent agreed to pay the rates fixed by the Railroad Commission and cannot now be heard to say that it could not fix a rate, or did not fix it in accordance with law, has no basis in fact. Furthermore, the tariffs of the Commission which are sought to be here applied, do not, as agreed between the parties, describe the kind and character of service rendered by petitioner.

Two other points are made by respondent in support of his theory of estoppel. One is with respect to the testimony of respondent's traffic manager at Austin. The other is that respondent enjoyed every benefit that the State of Texas could grant under a contract carrier operation. With respect to the first assertion, we respectfully submit that there is not one line of evidence to the effect that respondent did send its traffic manager to Austin to testify; nor is there one line of evidence with respect to the nature of this witness' testimony. A complete answer to the latter point is that respondent did not receive a permit from the State of Texas. There is as much logic to this contention as there would be to an assertion that a shipper could not complain of a confiscatory or unlawful rate because it enjoyed the benefit of shipping its commodities over the lines of the carrier affected by the confiscatory or unlawful rate. Furthermore, no complaint is made of the statute as properly construed. It is conceded that the Commission could, for the protection and convenience of the public in the use

of the highways and to preserve the highways, require a contract carrier to obtain a permit, post a bond, not overload, and otherwise comply with safety measures. This is quite separate and apart from respondent's contention that the Commission went further and undertook to prescribe a rate to be charged for the services here involved when there were lacking the prerequisite facts necessary to authorize the Commission to act at all with respect to rates. Petitioner now undertakes to invoke an estoppel against respondent when he agreed by written contract, before any services were performed, that competition between himself and common carriers over the highways of Texas did not exist (a prerequisite to the Commission exercising rate-making powers at all) and that the Commission had in fact not fixed rates. How the subsequent use of petitioner's facilities under this contract could estop respondent from asserting the truthfulness of the facts agreed upon is difficult to conceive.

The cases of *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U. S. 125, 66 L. Ed. 855, and *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 300, 73 L. Ed. 390, have no application. In *Pierce Oil Co.* v. *Phoenix Refining Co.* it appears that Pierce Oil Company, a foreign corporation, applied for and obtained a permit to do business in the State of Oklahoma at a time when a statute was in effect in the state declaring a corporation engaging in the character of business Pierce Oil Company sought authority to engage in to be a common carrier. It was simply held by this Court that Pierce Oil Company, having applied for a permit to do business under the laws of the State of Oklahoma, which declared such business to be that of a common carrier,

could not thereafter complain of the constitutionality of the law on the ground that the law deprived it of its property without due process of law.

This Court in *United Fuel Gas Co.* v. *Railroad Commission, supra,* held that the Gas Company voluntarily invoked the action of the Commission and could not therefore make a legitimate complaint that an order of the Commission thus invoked deprived the Gas Company of its property without due process of law.

The facts in this case are wholly dissimilar to the facts in either of the cases relied upon and the principles of law there announced have no application here.

Further illustrative of the principle announced in *Pierce Oil Company* v. *Phoenix Refining Company* and *United Gas Company* v. *Railroad Commission,* both *supra,* is the holding of this Court in *Booth Fisheries Co.* v. *Industrial Commission of the State of Wisconsin,* 271 U. S. 208, 210, 211, 70 L. Ed. 908. It was there held that an employer could not assail as unconstitutional under the Fourteenth Amendment the Workmen's Compensation Act of Wisconsin when the employer voluntarily elected to qualify under the Act and receive the benefits thereof; the Act being elective rather than compulsory. On the other hand, the decision of this Court in *Thompson et al.* v. *Consolidated Gas Utilities Corp. et al.,* 300 U. S. 55, 80, 81, 81 L. Ed. 510, cited and relied upon by petitioner at page 48 of his brief in support of another point, demonstrates the fallacy of his position here. It was there contended that Consolidated Gas Utilities Corporation, a foreign corpora-

tion, could not challenge the validity of a section of the gas proration statute because it had invoked the benefits of part of the statute. It was held that the Gas Company was not asserting any right under the statute which it assailed. Respondent here is not asserting any right under the order of the Railroad Commission (if construed as petitioner construes it) which it assails. Receipt of the benefits of petitioner's services as a contract carrier required no affirmative steps on respondent's part. The benefits thus received resulted incidentally from the permit itself and not from any ratemaking orders which were clearly separable therefrom. The mere fact that respondent holds a permit to transact business in Texas does not deprive it of its right to complain of an unlawful order of the Commission or of an unconstitutional act of the State Constitution. *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532, 533, 66 L. Ed. 352; *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 544, 66 L. Ed. 1044.

F. If the Legislature of Texas did declare the operations of every contract carrier to be in competition with the operations of common carriers over the highways of the State, and authorized the Commission to fix minimum rates for all contract carriers, then the State Law and the acts of the Commission thereunder as applied to respondent and to the transportation services here involved contravene the Fifth and Fourteenth Amendments to the Federal Constitution and are void.

The constitutional objection here presented was raised in the trial court (defendant's answer, Pars. 10, 11, 12, R. 45 to 48; defendant's motion for an instructed verdict, Par. 6, R. 268) and in the Fifth Circuit Court of Appeals (Specifications of Error VII and VIII, pages 18 and 19, appellant's brief, and argument thereunder, at pages 94 to 97). The attack upon the constitutionality of the statute and orders and acts of the Commission do not constitute an attack upon the judgment rendered by the court below. If respondent's constitutional attack is sustained, then the judgment of the court below is correct, regardless of the reasons upon which it was grounded. Petitioner, at page 43 of his brief, quotes from the caption of the legislative enactment, which is known as *Article 911b* of the *Revised Statutes*. He contends that the caption of the Act evidences a legislative intention of conferring the power and imposing the duty upon the Railroad Commission to fix minimum rates and charges for all motor carriers operating as contract carriers, regardless of whether or not such contract carriers operate in competition with common carriers over the highways of the state, and undertakes to construe the enactment of the Legislature accordingly. Petitioner also contends that Sec. 6aa is a legislative finding that all contract

carriers operate in competition with common carriers over the highways of the state. We disagree with petitioner's construction of the Act, but if petitioner is right and we are wrong, then the Act is clearly unconstitutional as sought to be here applied against respondent and as was applied by the Railroad Commission of Texas, if petitioner's construction of the orders of that Commission is correct. The decision of *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. Ed. 288, does not save the Act from the attack here made because the Act as there applied did not deprive the complainant of any constitutional guarantees. Here, if so construed, it does deprive respondent of rights guaranteed it under the Fourteenth Amendment to the federal Constitution. The definitions in the Act are found in Section 1. A "motor carrier" is defined as anyone operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this state.[10] A "contract carrier" is defined to mean:

> "any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier" (Subd. [h], Sec. 1, Article 911b).

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10 Subd. (g): "The term 'motor carrier' means any person, firm, corporation, company, co-partnership, association or joint stock association, and their lessees, receivers or trustees appointed by any Court whatsoever owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided, that the term 'motor carrier' as used in this Act shall not include, and this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns."

The evidence in this case shows that petitioner, Steele, was a private carrier transporting for respondent alone over the highways of Texas and performing private service for respondent. He was a contract carrier as defined by the Act, but the evidence showed and the jury found that his operations were not in competition with common carriers over the highways of the state and that the services performed by him were not substantially the same as those performed by common carriers. Any attempt upon the part of the State of Texas to fix rates governing such transportation, and apply the rates thus fixed against respondent, clearly violated respondent's constitutional rights under the principles announced in *Smith* v. *Cahoon*, 283 U. S. 553, 561, 562, 563, 75 L. Ed. 1264. A declaration of the Legislature that all contract carriers operate in competition with common carriers over the highways of the state, if such a declaration was in fact made, was an arbitrary declaration and bears no reasonable relation to the regulation of the highways in the public interest. *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 69, 70, 81 L. Ed. 510; *Smith* v. *Cahoon, supra*. Such a declaration is as arbitrary as a declaration that all motor carriers for hire are common carriers. This character of declaration was condemned as arbitrary and unconstitutional in *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101. This Court clearly has the power to determine if petitioner's constitutional rights have been thus invaded and, if so, to strike down the Act of the Legislature and the orders of the Commission as sought to be here applied. *Thompson* v. *Consolidated Gas Utilities Corp., supra.*

G. If the Texas Statute is construed as not requiring the Commission to find the existence of facts prerequisite to the exercise of the conditional rate-making powers there conferred, then the Texas Act violates the due process clause of the Federal Constitution.

Argument upon this point does not seem necessary in view of this Court's holding in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446.

Concluding our argument under Section One, we respectfully submit that the judgment of the Circuit Court of Appeals for the Fifth Circuit was a correct judgment for the several reasons presented in this section of respondent's brief, even though this Court should conclude that the judgment of the court below was predicated upon an erroneous ground.

Section Two

Answer to Section One of Brief of Petitioner.

If we are incorrect in the propositions presented under Section One of this brief, and if the Railroad Commission of Texas did undertake to apply its common carrier tariffs to the transportation services here involved, and if the acts and orders of the Railroad Commission in this respect were valid, and did not contravene the Constitution of the United States, then we submit that the reasons assigned by the Fifth Circuit Court of Appeals in support of the judgment rendered by that court are correct, and in support thereof we submit the following points:

1

The Circuit Court of Appeals correctly held that petitioner had no contractual cause of action and in so doing did not go outside the issues or facts.

2

The Circuit Court of Appeals correctly held petitioner to be without statutory cause of action to recover the rates allegedly fixed by the Railroad Commission of Texas.

3

The Circuit Court of Appeals correctly held that petitioner could not under the Statute nor under common law recover compensation in excess of the contractual compensation paid to and received by him in settlement of services rendered.

4

The Circuit Court of Appeals correctly held that the public policy of Texas did not require that petitioner be awarded a recovery in this case.

A. Petitioner has no contractual cause of action.

The authorities cited by respondent relating to the duty of common carriers to collect established rates, and the arguments presented by petitioner upon such authorities and the principles of law therein announced, have no application whatever to this case. Petitioner was a private carrier hauling commodities for General Mills alone; the public had no right to and could not use his services under the permit granted him; he was not operating in competition with common carriers over the highways of the state and did not perform substantially the same services as

those performed by common carriers. The compensation paid him had no legitimate relation to the regulation of the highways. In fact, the Commission expressly found that the operation under the private permit would not impair the efficient public service of any authorized common carrier or common carriers serving the territory and that the operations under the permit would not unreasonably interfere with the use of the highways by the general public for highway purposes (R. 96).

Petitioner, as plaintiff in the District Court, brought suit upon the contract dated August 26, 1940, and attached the same as Exhibit "A" to his First Amended Complaint (R. 6). No reference was made to the supplemental agreement of July 31, 1941. In Paragraph V of the complaint, petitioner pleaded a right to recover in the alternative, either upon the alleged rates prescribed by the Railroad Commission *or* upon the contract.

Respondent, as defendant below, by paragraphs 14, 15 and 16 of its First Amended Answer (R. 48-51) specifically pleaded that the contract sued upon did not constitute the entire agreement and that the supplemental agreement of July 31, 1941, was a part and parcel of the full contract of the parties. In detail the answer alleged the circumstances of the execution of the two agreements as constituting the contract of the parties.

Upon trial, evidence was introduced at length establishing beyond any question that the contract of the parties was evidenced by the two agreements and was intended to be so constituted from the outset (R. 135-162).

In fact it was petitioner and his counsel who suggested and caused the agreement to be evidenced by the two agreements instead of one. (See the correspondence, defendant's Exhibits 1 to 5 [R. 140 to 151] and the opinion of the Circuit Court). There was no denial or dispute of the evidence introduced upon this point. Neither petitioner nor counsel testified.

Thus, the repeated assertions in the brief of petitioner that the point decided by the Circuit Court that the *contract* of the parties was in fact constituted by *two* separate documents, was not an issue in the case and that the Circuit Court decided a point upon facts not in issue, or not raised in the trial court (brief of petitioner, p. 25), are utterly unfounded.

Here the Circuit Court merely held that as a matter of law under the undisputed evidence, the contract of the parties was evidenced and constituted by the *two agreements*, and not one.

—10 Tex. Jur., p. 286, sec. 166.

Petitioner next asserts that the supplemental agreement was void as against public policy and thus he should be permitted to ignore that part of the contract and sue alone upon the original agreement. The vice of this argument is forcibly pointed out in the opinion of the Circuit Court of Appeals. That Court held from the undisputed evidence that there was but one contract that spoke the actual intent of the parties as to the compensation to be paid to petitioner, and that such intent was evidenced by the supplemental agreement under which all the services

were performed; that the provisions of the supplemental agreements were a part and parcel of the *only contract existing between the parties*. The court below also correctly held that a contract modified before performance, takes the place of the original contract and that all services in the case at bar were performed under the contract as constituted by the supplemental agreement. The evidence conclusively shows that at the very time the original contract was executed it was contemplated that a supplemental agreement would be entered into for the purpose of amending the compensation provisions of the original contract before any services were performed thereunder. That is exactly what was done.

Furthermore, Section 13 of the original contract (the covenant relied upon) only required respondent to pay rates promulgated by the Railroad Commission "for the kind and character of services to be rendered hereunder" (R. 91). The evidence shows that Tariff 1-A of the Railroad Commission, sought here to be applied, *did not cover the kind and character of services rendered by petitioner*, since such services so rendered were not substantially the same services as those rendered by common carriers. The tariff itself described services dissimilar in many respects. The parties to the modified contract (entered into subsequent to the order of the Commission which petitioner now asserts applied the general tariff to the services here involved) expressly stipulated:

> "It is mutually understood and agreed that the Railroad Commission of Texas has not fixed any rates, charges or tariffs, and has not promulgated any rules

and regulations respecting, for the kind and character of service to be rendered hereunder, * * * " (Record 156).

Under the stipulation of the parties and the evidence, no claim can be asserted under the covenant of the original contract *because the very standard fixed for determining the compensation to be paid thereunder failed.*

—*Canadian National Ry. Co.* v. *George M. Jones Co.*, 27 Fed. (2d) 240, 242.

Even if the Railroad Commission tariffs did fix rates for the kind and character of services here involved and the orders of the Commission made such tariffs applicable to the services rendered under the contract, it does not follow that the modified contract was void. Under Section 6-aa of the Texas Motor Carrier Act, Article 911b, *Texas Revised Civil Statutes*, the Commission *is empowered to fix minimum rates for contract carriers operating in competition with common carriers.* Such contract carriers may charge any rate they wish and can agree upon with the shipper, which exceeds the minimum. The compensation specified in the modified contract might or might not exceed the minimum rates here relied upon, dependent upon costs, which included depreciation on equipment, damage claims and losses (absorbed by respondent), administration charges, and many other elements. It is quite conceivable that the compensation required to be paid petitioner could have exceeded the minimum rates relied upon. The modified contract was therefore not void. *Charles Warner* v. *T. & P. Ry. Co.*, 164 U. S. 418, 41 L. Ed. 495; *Weatherford, M.*

W. & N. W. R. Co. v. *Wood*, 88 Tex. 191, 28 L. R. A. 526; *Wright* v. *Donaubauer*, 154 S. W. (2d) 637; *Great Atlantic & Pacific Tea Co.* v. *Warren*, 44 S. W. (2d) 510. It required actual experience to determine if the compensation required to be and actually paid was less than the alleged minimum requirements of the Commission. It is clear that petitioner cannot here recover under the covenants contained in the contract.

But if the contract were void, it could not be segregated as to lawful and unlawful portions, the invalidity permeated the entire transaction and petitioner, the "prime offender," being in *pari delicto* could not and should not recover under the contract which was fully executed long before the suit was brought.

—*Wright* v. *Wight & Wight*, 229 S. W. 881.

In 10 Tex. Jur., p. 242, Sec. 140, it is stated:

> "Where an illegal contract has been fully executed, the courts will not interfere to litigate the claims of parties *in pari delicto* who have been injured thereby; neither a court of law nor a court of equity will aid either party to recover or reinvest himself with any title or interest vested in the other, but will leave them in the same position as to vested interests as they, by their own acts, have placed themselves. So money paid under an illegal contract may not be recovered back, where the contract has been fully executed and the parties are *in pari delicto*."

We respectfully submit that upon this point a simple question of law, having no importance to the public wel-

fare or interest, was correctly decided, to-wit: That petitioner had no right to recover under the contract.

B. Petitioner has no Statutory or Common Law cause of action.

As pointed out by the Circuit Court of Appeals, petitioner was not content to stand solely upon his alleged contract. He claimed a right of recovery under the Texas statute and now also contends that he has a common law right to recover the rates and charges allegedly fixed by the Railroad Commission.

The underlying basis of the argument of petitioner is that public policy demands a recovery be allowed petitioner (not the State of Texas) in order to carry out the announced purpose of the Texas Motor Carriers Act (Article 911b, *supra*), notwithstanding the absence of a provision in that Act affording a cause of action to contract carriers such as petitioner, to recover the alleged rates prescribed by the Commission, and notwithstanding the absence of a provision in that Act making it the absolute duty of such contract carrier to collect such rates.

In brief, the stated purposes for the enactment of the Texas Motor Carrier Act are: (1) To preserve the highways of the state; (2) to protect the traveling public from injuries resulting from unrestricted use of the highways for business purposes; and (3) to eliminate descrimination in rates charged (Sec. 22b of the Act, *supra*).

While not specifically stated in the enactment itself, it is clear that another controlling purpose of the Act was

to protect common carriers from unfair competition of contract carriers operating in competition with common carriers and performing substantially similar services (see the opinion of Circuit Court of Appeals in this case and the opinion of this Court in *Stephenson* v. *Binford*, 287 U. S. 251, 77 L. Ed. 288).

Respondent has at no time asserted the invalidity of the Texas Motor Carrier Act if properly construed. The decision by the Circuit Court in no manner adversely affects that Act. It is conceded that the State of Texas has constitutional authority to regulate and control, in any reasonable manner, motor transportation over the highways of that state. *Stephenson* v. *Binford*, *supra*, determined that question in 1932.

In the case at bar no contention has been made that the transportation services performed by petitioner created an undue burden upon the highways of the state or injuriously affected the use thereof by others. In fact, the Commission, in granting the permit, found to the contrary and the evidence shows that all of the regulatory safety measures were made applicable to the services rendered. There is no claim that such regulatory measures were not observed.

Common carriers were not adversely affected in any respect by the transportation services rendered by petitioner or the charges made therefor. The evidence is undisputed that not one pound of tonnage was diverted from common carriers through the operations of petitioner. On the other hand, the evidence is conclusive that the class

of commodities previously shipped by respondent over common carrier lines continued to be shipped over common carrier lines throughout the period of Steele's operations.[11] The jury found and the evidence showed that Steele did not operate in competition with common carriers over the highways of the state and that the services performed by him were not substantially the same as the services performed by common carriers. The class of commodities handled and delivered by Steele was previously handled and delivered by respondent in its own trucks operated by its own drivers. During the Steele operation such commodities were handled and delivered in the same trucks (sold by respondent to petitioner), and operated substantially by the same drivers, with the only difference being that previously the trucks were the property of respondent and the drivers its employees. Manifestly, the interest of common carriers was not adversely affected by the operation. In any event, they are not here complaining in any respect of the operations or the prices charged and received.

There was no discrimination in rates charged because, as stated by the Circuit Court of Appeals:

> "Moreover, a contract carrier who hauls for only one customer cannot be guilty of discrimination in the matter of rates. He has no other customers in whose favor he could discriminate" (R. 318).

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[11] The testimony of the witness, Frank Cross (R. 201 to 211), disclosed in detail the facts with respect to the transportation of the products of respondent over a comprehensive period of fifty-four months, in relation to transportation by common carriers. This evidence was not disputed and conclusively established that the operations of petitioner did not adversely affect the business of any common carrier.

Petitioner was not a contract carrier hauling for numerous contractees or the public at large. He hauled only for General Mills and the permit under which he operated restrained him from hauling for others.

Moreover, it may be noted that as to the *contract motor carrier*, the prevention of discriminatory rates, insofar as the public is concerned, *was not intended or provided for.* The statute only provides that in cases where it is proper for the Railroad Commission to prescribe rates (*i. e.*, for contract carriers in competition with common carriers), the Commission shall prescribe minimum rates which shall not be *less* than the rates prescribed for common carriers for substantially the same service.

This Court had occasion in *Stephenson* v. *Binford*, *supra*, to note this fact. Speaking of the authority of the Railroad Commission to prescribe rates, it was there said:

> "*The authority is limited to the fixing of minimum rates.* The contract carrier may not charge *less* than the rates so fixed, *but is left free to charge as much more as he sees fit and can obtain.*". (P. 274, official report.) (Emphasis ours.)

A contract motor carrier in Texas, operating in competition with common carriers and under a prescribed minimum rate schedule, may discriminate at will among his customers so long as he does not adversely affect the common carrier by charging *less* than the prescribed rates.

Such discrimination could not be exercised by common carriers and the common carrier cases cited in support of requiring recovery because public policy denounces dis-

crimination in rates, are not applicable here. The difference in policy between contract and common carriers is further illustrated by the fact that the contract carrier is not required by the law to file a copy of his contract of carriage nor is he required to file a schedule of rates as the common carrier is required to do. (Sec. 10 [3], Article 911b, *supra*.)

In these vital respects the Texas Act differs from the federal enactment and the enactments of some other states from which authorities have been cited by petitioner. In fact, the only regulation with respect to rates charged by contract carriers is found in Section 6aa of the Act (Article 911b, *supra*), wherein the Commission is vested with power to prescribe minimum rates for contract carriers *operating in competition with common carriers* which minimum rates *shall not be less* than rates prescribed for *common carriers performing substantially the same service*. No finding was made by the Commission that the operations of Steele were or would be in competition with common carriers or that the services to be performed by him were substantially the same services as those performed by common carriers. The facts found by the Commission in its order are to the contrary. By evidence and express findings of the jury, both of these essential elements are here lacking.

It is inconceivable that the interest of the public is here involved. If there has been a violation of the Act, the remedies specifically given the State by the Act itself

are amply sufficient to prevent recurring or future violations.

On the other hand, the Act discloses that the State is concerned in the rates charged by common carriers by motor, the same as it is concerned in the rates of common carriers by rail. Section 10 (3) of the Act requires a common carrier by motor to file with its application for a certificate of public convenience and necessity "a proposed schedule of service and a schedule of rates to be charged between the several points or localities to be served." No similar requirement is made of contract carriers. There is no regulation of the Commission requiring any such schedule to be filed. It is true the Circuit Court of Appeals said it was appropriate and perhaps requisite that an applicant for a permit should exhibit his contract of carriage under which he proposed to operate. The Court evidently prefaced this remark upon statements made in certain letters of petitioner's attorneys preceding the execution of the written agreements wherein statements are made that a custom prevailed that a contract carrier must submit his contract to the Commission showing the rates to be charged shall be such rates as prescribed by the Commission, but the law itself makes no such requirement.

Section 6a of the Act specifies in great detail the information necessary to be set forth in an application by a contract carrier for a permit. There is no requirement that a schedule of rates be filed or exhibited. There is no evidence of any regulation of the Commission to this effect. Certainly a prevailing custom or an unwritten requirement of the Commission in this respect could not act as a

substitute for an enactment of the Legislature nor control the public policy of the State. The public policy of the State is defined by its authorized lawmaking body, not by custom or by an unauthorized requirement of a subordinate administrative board.

Regardless of the name designated, petitioner was nothing more than a private carrier hauling and performing services exclusively for respondent. Neither the public nor any other potential customer was entitled to demand his services. Common carriers were not interested in or prejudiced by the services performed by him because his operations were not in competition with or similar to the services performed by common carriers, and diverted no tonnage from such common carriers.

It therefore appears from an analysis of the evidence and of the law itself that this case differs in vital and material respects from the common carrier and contract carrier cases relied upon by petitioner.

C. Cases Cited by Petitioner Distinguished.

The case of *Papetti* v. *Alicandro*, 58 N. E. (2d) 155 (Supreme Judicial District Court of Massachusetts), is cited and quoted from at pages 18 and 19 of petitioner's brief.

An analysis of that case, however, clearly discloses distinguishing facts upon material and essential elements not present in the case at bar. The carrier there involved was operating part of the time in question as a contract carrier and part of the time as both a contract and com-

mon carrier. The carrier was required to and did file with the Department of Public Utilities a schedule or tariff of rates which were kept open for public inspection. Apparently the only essential difference between contract and common motor carriers in Massachusetts is that the contract carrier might choose his customers and operate under infrequent schedules, whereas the facilities of the common carrier were required to be kept open for all. It may be fairly inferred from the decision that the contract carrier in the *Papetti* case was operating in competition with common carriers and performing substantially the same services. In any event, the Court made no distinction between a contract carrier and a common carrier and it is not apparent that there was any contention that the contract carrier was not operating in competition with common carriers. The gist of the opinion was a denunciation of discrimination in rates insofar as shippers or the public in general was concerned. It has heretofore been demonstrated in the case at bar that this element of discrimination towards the public in the matter of rates is not involved in the case at bar. Furthermore, the Massachusetts law expressly required the contract carrier to collect the exact rate, no more and no less, specified in its filed schedule. As has heretofore been pointed out, the Texas Act does not require the contract carrier to collect a minimum rate and there is no prohibition against the charging of a rate higher than the minimum rate. In Texas the failure to observe the minimum rates, where authorized to be fixed, is simply made a penal offense and the State may institute suit for penalities against any person violating or procur-

ing the violation of any order or rule of the Commission, or suits in equity may be brought on behalf of the State to enjoin such violations. Article 1690b, Penal Code, Texas. It is significant that the Texas legislature failed to declare void contracts of a contract carrier providing for a rate less than prescribed by the Commission. In this respect the Motor Carrier Act differs from the Insurance Act, which declares void any contract or agreement not written in the application and the policy (Section 5, Article 4682b) and prohibits special favors and discriminations in the matter of rates, charges and premiums (Sec. 8, Article 4682b). The Act relating to common carriers by rail likewise prohibits discrimination in rates (Article 6448) and makes binding in all actions between private parties the published rates (Article 6452). The *Papetti* case therefore is based upon distinguishing and material features not present in the case at bar in that the contract carrier in Massachusetts is placed in the same category as a common carrier in the matter of rates; is required to file with the Department of Public Utilities a schedule of rates; is required to collect the exact rate specified in the schedule filed; is subject to a legislative enactment prohibiting any discrimination in rates, and because the facts in that case indicated no difference in the services rendered by the contract carrier involved from that of common carriers the fact and the law involved clearly distinguish the *Papetti* case from the case at bar.

Bottemueller v. *Wilson & Co.*, by the District Court for the Western District of Missouri, 57 Fed. Supp. 766, involved rates of a contract carrier operating under the

federal Motor Carrier Act. It was held that the published rates filed by the carrier with the Commission superseded the contractual rate. The federal Motor Carrier Act, Title 49, Section 318, U. S. C. A., expressly requires a contract carrier operating under the federal Act to file with the Interstate Commerce Commission tariffs setting forth the rates and charges to be filed. The tariffs are required to be open for public inspection and the carrier is expressly required to charge and collect the rates specified in the tariff. Under the federal Act a contract carrier may and frequently does haul under contract for numerous shippers. There was necessarily involved the controlling question of discrimination, not here present. The situation in the *Bottemueller* case is entirely different from that here involved.

The case of *Georgia R. R.* v. *Creety*, 63 S. E. 528, quoted from at page 21 of petitioner's brief, is simply a case involving the right of a common carrier by rail to collect from a shipper the correct published rate, notwithstanding the fact that the carrier's agent had unintentionally misquoted a lesser rate at the time the shipment was received.

T. & N. O. R. R. Co. v. *Yates*, 139 Texas 89, 161 S. W. (2d) 1050, and the subsequent case of *T. & N. O. R. R. Co.* v. *East Texas Gravel Co.*, 175 S. W. (2d) 435, announce the familiar rule that a railroad company is under the public duty of collecting from a shipper the correct rate published in the public tariffs. *T. & N. O. R. R. Co.* v. *East Texas Gravel Co.*, at pages 436 and 437, 175 S. W. (2d), announces that a railway company cannot by means of estoppel or any

other device escape the performance of the public duty required of it to collect the published rate. Nevertheless, under the facts in that case, it was held that the shipper was excused from paying the full rate by reason of the fact that the railway company delivered the shipment to the consignee and collected a lesser rate, contrary to the instructions of the shipper.

Louisville & Nashville R. Co. v. *Central Iron & Coal Co.*, 265 U. S. 59, 68 L. Ed. 900, is a case involving the duty of a common carrier by rail to collect from a shipper the published rate. This Court recognized, however, that notwithstanding this duty (265 U. S. 67, 68) a shipper might be released from the payment of the freight charges where the carrier accepts the shipment on condition that the consignee alone will be responsible for the charges.

The case of *T. & P. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, holds that where a railway company engaged in interstate commerce has filed its tariffs with the Interstate Commerce Commission and such tariffs have been received by the Commission, a shipper may not in the courts litigate the question of reasonableness or unreasonableness of the prescribed rates. The shipper's remedy is to apply for reparations from the Commission. The Commission and not the courts are charged with the duty of determining in the first instance the reasonableness of rates prescribed in tariffs. *Frank O. Lowden et al.* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 518, 83 L. Ed. 953, quoted from at page 19 of petitioner's brief, is another case involving the duty of common carriers by rail

to collect the charges prescribed by tariffs. This Court held that notwithstanding a shipper announced in advance he would not pay the prescribed charge, he was nevertheless bound to do so when using the facilities furnished by the carrier. This Court said that until changed, tariffs bind the carrier and shipper alike.

Petitioner, through inadvertence we assume, quoted from the dissenting opinion of CIRCUIT JUDGE STONE, at pages 17 and 18 of his brief, rather than from the majority opinion written by CIRCUIT JUDGE SANBORN in *New et al. v. Denison Clay Co.*, 260 Fed. 70. The dissenting opinion is found at pages 73 and 74. The majority opinion merely holds that a bill of lading issued by a common carrier by rail constitutes a valid written contract on the part of the shipper to pay the lawful rates prescribed by the published tariffs and that the statute of limitations relating to written contracts rather than oral contracts applies.

The Texas cases relating to common carriers by rail announce substantially the same rule as announced by this Court and other United States courts. For instance, *Texas Central Ry. Co. v. Kerns*, 108 S. W. 187, quoted from at page 14 of petitioner's brief and again cited by him at page 25, holds that the published rate is binding upon the shipper and common carrier by-rail alike and may not be deviated from. The Texas Rail Statute so provides.

West Texas Compress & Warehouse Co. v. Panhandle & Santa Fe Ry. Co., 15 S. W. (2d) 558, quoted from at page 14 of petitioner's brief, holds that a rule of the Railroad Commission of Texas relating to common carriers by rail

with respect to stoppage of cotton in transit, and promulgated pursuant to legislative authority, is valid and binding upon shipper and carrier alike under the express provisions of statute until set aside by the Commission. It is interesting here to note that this case inferentially holds (page 561, 15 S. W. [2d]) that the courts may determine if a rule of the Commission is authorized by law. On the other hand, if the rule is authorized by law and attacked on the ground that it is unfair or unjust, the courts are without jurisdiction until the aggrieved person pursues the statutory remedy of appeal authorized by the statute. This case sustains our position that the power of the Commission to enact a rule or rate is always the subject of judicial review. On the other hand, when power is present, a rule or rate established pursuant thereto may not be attacked collaterally in the courts on the ground that the rule or rate is unreasonable or unjust. The person aggrieved must pursue his statutory remedy and may only attack the rule or rate collaterally if void.

Railroad Commission of Texas v. Uvalde Construction Co., 49 S. W. (2d) 1113, is another case involving the right of the shipper to attack in court a rate promulgated by the Railroad Commission affecting common carriers by rail. The Court held that the reasonableness of a rate promulgated pursuant to lawful authority was not the subject of judicial review in an independent action.

The Circuit Court of Appeals correctly held that cases involving freight rates of rail carriers, interstate under the federal Act and intrastate under the Texas Act, have

no application here. The interest of the public in such rates is clear. The Acts expressly required such rates to be observed by shipper and carrier. Under the Texas Act relating to rail carriers, the rates prescribed by the Commission are conclusive in all actions between shipper and carrier (Article 6452). Similar requirements are made in the federal Act relating to both carriers by rail and carriers by motor.

D. No question of public policy involved.

Discrimination is not here involved. Injurious competition to common carriers is not here involved. Safety of the highways is not here involved. Public policy of the State does not require petitioner to collect the alleged rates prescribed by the Railroad Commission in the interest of the public. The Motor Carrier Act does not denounce as void agreements with contract carriers providing for a lesser rate than the minimum fixed by the Commission. If there has been a violation of any valid order of the Commission, certainly the remedies prescribed by the Act itself are amply sufficient to protect the State. *American National Insurance Co. v. Tabor*, 230 S. W. 397, 399. We quote from the *Tabor* case:

> "The statute does not denounce as void any policy which violates its terms. The expressly declared consequences of infractions of the statute appear to be ample to secure its obedient observance. The Supreme Court of the United States was of the opinion that, where this was true, it was the reasonable implication that the Legislature meant for only the statutory

remedies to be applied, and it did not mean for courts to refuse to enforce contracts which were not declared void or unenforceable, though in contravention of the statute. *Harris* v. *Runnels*, 12 How. 79, 13 L. Ed. 901."

The Railroad Commission of Texas has not complained and is not here complaining. It must be presumed that the Commission is and has been fully informed of the compensation paid petitioner by respondent. Under Section 13b of the Act it is made the duty of the Commission to require reports to be filed by each motor carrier with the Commission of all operations under the Act. The Commission, under Section 14 of the Motor Carrier Act, is permitted to hear complaints, require production of records, and subpoena witnesses, to determine if any motor carrier is violating any provisions of the Act or any order of the Commission. No criminal complaints have been filed against petitioner. No suit for penalty has been filed. No equitable action to restrain violations of the Commission's order has been filed. All of these remedial rights are afforded the State under the Act. Article 1609b, Penal Code of Texas.

On the other hand, petitioner is here seeking to recover on the basis of his own wrong. A denial of a recovery here is more conducive to discourage rather than encourage future violations of the Act and orders of the Commission. If a recovery is permitted an unscrupulous contract carrier may, with impunity, solicit the business of a shipper upon representations that the services to be performed do not come under the purview of the ratemaking orders of the Commission, perform such services, collect the contractual

rate, and after the termination of the agreement, change his front and demand the collection of the legal rate. This is precisely what was done here. It is fairly inferable from this record that had petitioner and his counsel not so urgently insisted that the Railroad Commission rates were not applicable and that the Commission was without power to prescribe rates for services such as those to be performed by petitioner, respondent would have continued, as it had done in the past, to transport the class of merchandise involved in its own trucks operated by its own drivers.

If a recovery is permitted here, an unscrupulous contract carrier may underbid a legitimate carrier and then nevertheless, after the contract is completed, recover the same charges as those bid by his competitor. On the other hand, if a recovery is denied, unscrupulous contract carriers will be discouraged from attempting such acts as it is manifest petitioner was guilty of committing in this case. The public interest will be better subserved in denying a recovery here than by permitting it, for the very pointed reasons stated by one of the Texas Appellate Courts in the case of *Wright v. Wight & Wight*, 229 S. W. 881, from which we quote:

> "If it be conceded that the transaction in question violated the law mentioned (although we regard it as debatable), yet the appellees were parties thereto and transgressors of section 22 of the same act (article 4896), which made it unlawful for any agent 'to grant or contract for * * * any position or any valuable consideration or any inducement not specified in the policy contract of insurance.' Under section 22, anyone so offending is declared guilty of unjust discrimi-

nation. So all of the parties are *in pari delicto* in an unlawful agreement which the pleading and agreed facts discloses has been fully executed. This being true, the courts will leave the parties where it finds them. They will extend no aid to recover back money paid under such an illegal and forbidden contract. *Seeligson* v. *Lewis*, 65 Tex. 217, 57 Am. Rep. 593; *Robertson* v. *Marsh*, 42 Tex. 151; *Glenn* v. *Mathews*, 44 Tex. 405" (Page 882, 229 S. W.).

In answer to the contention that public policy requires a recovery, the Court further said:

"Appellees say, however, they should be allowed to recover because the public interest will be better promoted by granting than by denying them relief. It is true that as between parties *in pari delicto* relief will be granted if public policy demands it. In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public; the guilty party to whom relief is granted being only the instrument by which the public is served. The relief is granted to discourage such transactions by others.

"But, we think, the public interest will be just as well served by denying a recovery to the appellees as it would be by granting such recovery and imposing the loss upon the appellants. Insurance agents will be discouraged from making and carrying out discriminatory agreements when they know that the courts will not allow them to recover back money which they have expended in pursuance of such forbidden contracts." (Page 882, 229 S. W.)

Furthermore, it should be emphasized that the Circuit Court of Appeals did *not* hold, nor can it be possibly in-

ferred that the Court held, that the rule of *pari delicto* could be asserted to bar recovery by a *common* carrier of lawfully prescribed tariffs.

The Texas cases of *Herrin Transportation Co.* v. *Marion*, 113 S. W. (2d) 291; and *Central Freight Lines, Inc.* v. *C. & S. Motor Freight Lines*, 125 S. W. (2d) 615; cited and quoted from by petitioner, have no application.

The *Herrin Transportation Co.*, case involved a *common carrier* operating under a certificate of convenience and necessity. The common carrier filed tariffs with the Railroad Commission and thereafter made a contract with the shipper to transport commodities at a lesser rate. The shipper undertook to enforce the transportation agreement and to recover damages because the rate charged by the carrier was in excess of the contract rate. The Court merely held that the rates fixed by the Commission controlled and that damages could not be recovered against the common carrier growing out of a breach of a contract to transport the commodities at a rate less than the Commission rates. *The Court left the parties where it found them.*

Central Freight Lines, Inc. v. *C. & S. Motor Freight Lines, supra*, involved a controversy between *common* carriers. One sold its certificate of convenience and necessity to another under a verbal agreement that the purchaser should forego certain pickup privileges afforded under the certificate. The Railroad Commission approved the sale of the certificate but the restrictive agreement was not submitted to nor approved by the Commission. The seller under-

took in an equitable action for injunction to enforce the parol agreement and enjoin the purchaser from exercising the pickup privileges. It was held that injunction would not lie to enforce an illegal *executory contract*.

The case of *Brown & Root* v. *Traders & General Insurance Co.*, 135 S. W. (2d) 534; cited and quoted from at page 31 of petitioner's brief, in no sense supports petitioner's theory. On the other hand, the effect of the decision is against petitioner's contention. This was a case involving reparations under the Insurance Act. The State Insurance Department erroneously classified the risk involved and applied a rate higher than was justified. Later the error was discovered and the department reclassified the risk so as to apply the proper rate and made the rate retroactive to a prior date. The insured contended that the corrected rate should have been made retroactive to the anniversary of the policy, and by way of cross action in a suit brought by the insured to recover the premium, sought credit for the excessive rate during the period of time the Insurance Department refused to make the corrected rate retroactive. It was contended that the orders of the Insurance Department were binding and could not be reviewed by the court. The Galveston Court of Civil Appeals (writ of error refused, correct judgment, Supreme Court) distinguished between the ratemaking and administrative powers of the Commission, holding that classification of risks under existing tariffs was merely an administrative; not a ratemaking, function and that the Commission should have made the corrected rate retroactive from the anniversary date of the policies, and judgment was rend-

ered in favor of the insured accordingly. This was not an appeal from the orders of the Commission but an independent suit brought in a different jurisdiction from that in which an ordinary appeal would lie. No question of public policy was presented in the case. Both sides to the controversy recognized that the Commission had originally erroneously classified the risk and applied the wrong rate and both sides recognized the power of the Commission to change the classification. The only question involved was whether the order should have been made retroactive to the anniversary date of the policies or at some more recent date. We have previously, at page 88 hereof, distinguished between the Motor Carrier Act relating to contract carrier rates and the Insurance Act relating to public insurance rates.

Petitioner's position is most unusual. The record discloses without dissent that at the time the contract was negotiated and executed petitioner and his counsel were of the opinion that the transaction entered into was a perfectly legal one. The record discloses that petitioner and respondent in writing agreed that the Railroad Commission of Texas had not prescribed rates for the kind and character of service to be rendered by petitioner and the parties fixed the basis for the charges to be made. The permit had been granted and all ratemaking orders now relied on were then in existence and well known to petitioner and his attorney. For three years petitioner hauled for respondent and billed respondent for charges in accordance with the contract. Each month there was an accounting between the parties for the previous month's charges. Not until the

contract was terminated did petitioner or his counsel, who have represented him throughout, conceive the idea (so far as the record shows) that the transaction was illegal and that the Railroad Commission rates applied. The record does not indicate the reason for the change in front. The Circuit Court of Appeals significantly said:

> "Surely a Daniel has come to judgment and from what a remarkable source!"

Petitioner should not now be permitted to take advantage of his own wrongs. The paramount purpose of public policy is to prevent inducements for the commission of a wrong. Again we repeat that public policy is much better subserved by the judgment rendered in the court below than it would be if a recovery was allowed petitioner in this case based on his own wrong. The public interest cannot be legitimately served by such a recovery nor does public policy demand it.

Section Three

The two-year Texas Statute of Limitation prohibits a recovery on so much of petitioner's cause of action as accrued more than two years before the institution of the suit in the District Court.

If petitioner has any cause of action at all it is one for a debt not evidenced by a contract in writing and therefore must be commenced and prosecuted within two years after the cause of action accrued under Article 5526 of the Revised Statutes of Texas. The pertinent parts of the statute are as follows:

"There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description: * * *

"4. Actions for debt where the indebtedness is not evidenced by a contract in writing."

The contract in writing in this case defeats petitioner's cause of action. His cause of action, if he had one, is purely a suit for debt arising by operation of law. The carrier cases, such as *Texarkana & Ft. S. Ry. Co. et al.* v. *Houston Gas & Fuel Co.*, 51 S. W. (2d) 284, cited and quoted from at page 58 of petitioner's brief, have no application. The four-year statute of limitation applies in that class of cases because the shipments moved under written bills of lading expressly or impliedly obligating the payment of the tariff rate. The cause of action was predicated on the bill of lading. There is no bill of lading here involved. The only written contract between the parties requires the payment of the charges actually paid. The cause of action for a part of the charges allowed petitioner in the trial court's judgment arose more than two years before the institution of the suit. Defendant pleaded the two-year statute of limitation and complained of the action of the trial court in rendering judgment in petitioner's favor for so much of the cause of action as accrued more than two years before the commencement of the suit by appropriate specifications of error (page 22, appellant's brief in Circuit Court of Appeals, and page 116, wherein argument was presented thereon).

Section Four

Specifications of Error presented in the Fifth Circuit Court of Appeals and not decided by that Court are not waived but here insisted upon.

Respondent by its Specifications of Error V and VI, presented in its brief in the court below, complained of the action of the trial court in filing Findings of Fact and Conclusions of Law, and particularly in filing Findings of Fact upon fact issues submitted to the jury and determined by the jury in their special verdict; such verdict not having been set aside (page 17, appellant's brief, Circuit Court of Appeals).

The argument upon these Specifications is found at pages 73 to 80 of appellant's brief. The Circuit Court of Appeals did not deem it necessary to pass upon these Specifications. Respondent by Specifications of Error VII and VIII in the Fifth Circuit Court of Appeals complained of the action of the trial court in excluding competent evidence offered by it from the witness, Frank H. Cross (page 21, appellant's brief in Circuit Court of Appeals). The argument in support of these Specifications is found at pages 107 and 111. The Circuit Court of Appeals did not find it necessary to pass upon these Specifications.

By Specifications of Error XIV, XV and XVI respondent complained of the trial court's charge in placing the burden of proof upon respondent to establish the negative of the issues submitted; of the action of the trial court in refusing to afford respondent the right to open and close the evidence; and of the action of the trial court in with-

drawing from the consideration of the jury upon the issues submitted respondent's Exhibits 1 to 6, inclusive (correspondence found in the Record, pages 140 to 143). The Specifications of Error are found in appellant's brief in the Fifth Circuit Court of Appeals at pages 21 to 22, and the argument thereunder at pages 111 to 115. The Specifications of Error last referred to were not passed upon by the Circuit Court of Appeals. Respondent's Specification of Error XI in the Circuit Court of Appeals complained of the action of the trial court in overruling defendant's motion to strike or, in the alternative, to require petitioner to make more certain and definite certain allegations in the complaint. This Specification of Error is found at pages 20 and 21 of appellant's brief in the Circuit Court of Appeals and the brief of argument thereunder at page 106. This Specification of Error was not passed upon by the Circuit Court of Appeals.

The undetermined Specifications of Error are still insisted upon by appellant and are not waived.

Specifications of Error XI, XII, XIII, XIV, XV and XVI only become important if for any reason this cause is remanded to the trial court for a new trial. Specifications of Error V and VI are submitted as further grounds supporting the judgment rendered by the Fifth Circuit Court of Appeals.

IN CONCLUSION respondent respectfully prays of this Court that the judgment of the Fifth Circuit Court

of Appeals be in all things affirmed and that respondent be granted all other relief as it may be entitled to and allowed its costs.

Respectfully submitted,

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November, 1946.

BRIEF AMICUS CURIAE

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NO. 1056 79

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

LEO H. STEELE,
Petitioner

V.

GENERAL MILLS, INC.,
Respondent

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE*

on

THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. 1056

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THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

May It Please the Court:

The State of Texas respectfully files brief as *amicus curiae* on the application of petitioner for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

The State entered this litigation as *amicus curiae* after the judgment of the United States Circuit Court of Appeals for the Fifth Circuit. The Circuit Court recognized the validity of the entrance of the State in the following opening paragraph of its Per Curiam opinion: "We are indebted to the Attorney General of the State of Texas for his able brief as *amicus curiae* on the petition for rehearing." The petition for rehearing was denied.

The record discloses that petitioner, a private citizen of Texas, applied for a Texas contract carrier permit upon the basis and for the purpose of transporting respondent's products only. Respondent is a Delaware Corporation with a permit to do business in Texas. In the application, petitioner agreed to charge the rate promulgated by the Railroad Commission of Texas and there was submitted to the Commission prior to the granting of the permit a contract between petitioner and respondent stipulating, among other things, that the rate to be charged by petitioner and paid by respondent "shall be such rates, charges or tariffs as may be fixed by the Railroad Commission of the State of Texas, and in conformity with the rules and regulations now in existence or that may hereafter be promulgated by said Commission for the kind and character of service to be rendered hereunder." The order granting the permit contained the provision "in connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract carriers the

rates prescribed for common carrier motor carriers." Shortly after the granting of the permit, petitioner and respondent entered into a second contract, which was never submitted to the Railroad Commission, setting a rate for the services to be performed under the contract carrier permit of cost plus ten per cent; this rate was less than the Texas minimum contract carrier rate. Petitioner charged and respondent paid under the second contract.

The following statement in appellant's (respondent here) brief to the Circuit Court of Appeals is correct:

> "There was no controversy in the trial court, nor is there any here, with respect to the quantity of tonnage handled by appellee; the number and dates of the trips made; the points between which the commodities were handled; and the kind and class of commodities. Both parties were in agreement with respect to the amount of money actually paid appellee and likewise the amount appellee would have been entitled to if he is entitled to apply the tariff rate relied upon by him to the commodities handled and to recover the difference between the contractual compensation paid and the tariff rate relied upon." (Page 23)

The record discloses that petitioner transported the commodities of respondent under his contract carrier permit from August 1, 1941, to October 31, 1943, moving a total tonnage of 424,919,582 pounds. He was paid $44,803.33; under the minimum Texas contract carrier rates, he would have been paid

$77,814.98. This law-suit is for the difference.

Enforcement of the Texas contract carrier rate structure is involved in this case. Petitioner's contract carrier application; the hearing before and order of the State administrative agency, the Railroad Commission of Texas, granting the permit; the general contract carrier rate orders of the Railroad Commission and the specific rate order applicable to the contract carriage of petitioner for respondent, are representative of the Texas contract carrier system.

There is no disagreement in the judicial expressions in this case regarding the validity of the Texas contract carrier rates or the applicability of the prescribed minimum rates to the contract carriage of petitioner for respondent. The Circuit Court judgment (Circuit Court Judges Waller and Lee composing the majority; Circuit Judge Hutcheson, the dissent) however, denied petitioner's recovery of the minimum contract carrier rates on the ground that the parties were *in pari delicto* in their arrangements represented in the second contract, hence will be left where they were. This judgment was believed by the State of Texas to be erroneous and because of its serious effect upon the integrity of the Texas contract carrier rate structure, the State filed a brief as *amicus curiae* on the petition for rehearing.

In the Per Curiam opinion denying the petition for rehearing, before Circuit Judges Waller and

Lee, no cognizance was taken of the fundamental proposition urged by the State; namely, that it is in the public interest that carriers collect and shippers pay the legally prescribed minimum contract carrier rates, notwithstanding the parties are *in pari delicto* in their joint violations. The reasoning of the Per Curiam opinion, and of the cases and texts cited, goes only to the question of allowing one party *in pari delicto* relief against the other, entirely separate and apart from the additional consideration of allowing recovery for the public good.

It is the conviction of the Attorney General of the State of Texas that the judgment of the Circuit Court of Appeals, in giving controlling effect to the *pari delicto* doctrine in a freight rate rebate suit, establishes a new precedent of far reaching implications. It is believed contrary to the precedents of this Court and of the Courts of Texas and other States, and to call for an exercise of this Honorable Court's power of supervision. The State of Texas is not concerned with the interests of either petitioner or respondent in this case, nor in their motives, whether innocent or fraudulent. It is vitally interested, however, in strict compliance by motor carriers and shippers in Texas with its legally prescribed freight rates, and in the integrity of its transportation system—rail and truck—to which the maintenance of the freight rate structure is essential.

The subject matter of this brief lends itself most appropriately to the following two headings:

THE TEXAS CONTRACT CARRIER

The single point: Texas Minimum Contract Carrier Rates, and Their Enforcement, are Matters of the Public Interest; Advancement of the Higher Public Policy Inherent in Strict Enforcement of Such Rates Calls for Intervention by the Court, Notwithstanding the Carrier and Shipper Are in Pari Delicto in Their Joint and Mutual Rate Violations.

THE TEXAS CONTRACT CARRIER

The Texas contract carrier and the minimum rates applicable to him rest on the following legislative, judicial, administrative, and procedural cornerstones.

Statutory references are to Sections and Subsections of Article 911b, Revised Statutes of Texas; these statutes are quoted here, rather than set out in an appendix, for purposes of continuity.

Article 911b is a comprehensive regulation of Texas motor carriers with the following declaration of policy in Section 22b:

> "The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and

hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public."

Section 1(g) defines "motor carrier":

"(g) The term 'motor carrier' means any person, firm, corporation, company, co-partnership, association or joint stock association, and their lessees, receivers or trustees appointed by any Court whatsoever owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided, that the term 'motor carrier' as used in this Act shall not include, and this Act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns."

Section 1(h) defines "contract carrier":

"(h) The term 'contract carrier' means any

motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier."

Section 1a(1) provides: "Provided, however, that the term 'Motor Carrier' and the term 'Contract Carrier' as defined in the preceding section shall not be held to include:"

"(a) Any person having a regular, separate, fixed, and established place of business, other than a transportation business, where goods, wares, and merchandise are kept in stock and are primarily and regularly bought from the public or sold to the public or manufactured or processed by such person in the ordinary course of the mercantile, manufacturing, or processing business, and who, merely incidental to the operation of such business, transports over the highways of this State such goods of which such person is the bona fide owner by means of a motor vehicle of which such person is the bona fide owner;"

And Section 1b:

"Any person who transports goods, wares, or merchandise under the circumstances set forth in the foregoing Section Ia so as to be excluded by the terms of said Section from the definition of 'motor carrier' or 'contract carrier' shall be deemed to be a private motor vehicle owner; and such use of the highways by such private motor vehicle owners, as herein defined, shall be construed as use of the highways for the general public and not the use of such highways for

the carrying on the business of transporting property for compensation or hire."

Section 4(a) reads in part:

"The Commission is hereby vested with power and authority and it is hereby made its duty to supervise and regulate the transportation of property for compensation or hire by motor vehicle on any public highway in this State, to prescribe or approve the maximum or minimum or (sic) maximum and minimum rates, fares and charges of each motor carrier in accordance with the specific provisions herein contained, * * *"

and in other respects subjects contract carriers as motor carriers to regulation by the Railroad Commission of Texas.

Specifically as to contract carriers, Section 6 requires a permit from the Railroad Commission to engage in business as such, which permit shall not "be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier."

Section 6(c) further provides "nor shall any such permit be granted if the Commission shall be of the opinion that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory * * *"

Section 6aa specifically provides for minimum contract carrier rates, as follows:

> "The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service."

Section 20 provides for appeals from orders of the Railroad Commission and reads in part as follows:

> "If any motor carrier or other party at interest be dissatisfied with any decision, rate, charge, rule, order, act, or regulation adopted by the Commission, such dissatisfied person, association, corporation, or party after failing to get relief from the Commission may file a petition setting forth the particular objection to such decision, rate, charge, rule, order, act or regulations, or to either or all of them in the District Court in Travis County, Texas, against said Commission as defendant. * * *"

The penal provisions of the Act are codified as Article 1690b, Penal Code of Texas; Section (i) thereof reads:

> "If any motor carrier, or any officer, agent, clerk, servant, or employee, or receiver, or his agents, servants, or employee, of any motor car-

rier operating as a contract carrier in this State, shall, directly or indirectly, or by any special rate, rebate, draw-back, or other device, for or on behalf of such contract carrier, knowingly charge, demand, or contract for, collect or receive from any person, firm or corporation a less compensation for any service rendered or to be rendered by any such contract carrier than is prescribed for said service by said Commission, such contract carrier or any officer, clerk, servant, or employee, or receiver, his agents, servants, or employee, of such contract carrier shall be guilty of a misdemeanor and, upon conviction shall be fined in a sum not to exceed Two Hundred Dollars ($200.00) for each offense; and every person who violates or fails to comply with, or procures, aids, or abets any contract carrier in the violation of the provisions hereof shall likewise be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than Two Hundred Dollars ($200.00) for each offense."

The Texas statutes thus delineate private carriers as not subject to the regulations of Article 911b, and regulate common carrier motor carriers and contract carrier motor carriers in the competitive business of transporting property for compensation or hire over the highways of Texas. The legislative purpose that common carriers shall not be impaired by contract carriers, either in the granting of contract carrier permits or in the rates to be collected by contract carriers, is clear and fundamental.

This Honorable Court, speaking through Mr. Justice Sutherland in *Stephenson* v. *Binford*, 287 U. S.

251, upheld the Texas statutes regulating contract carriage, and at page 273 precisely drew the connection between the public purpose in relieving the highways of traffic and the legislative provision for minimum rates for contract carriage, in these words:

> "What has just been said applies in the main to the other challenged provision authorizing the commission to prescribe minimum rates not less than those prescribed for common carriers for substantially the same service. This provision, by precluding the contract carriers from rendering service at rates under those charged by the railroad carriers, has a definite tendency to relieve the highways by diverting traffic from them to the railroads. The authority is limited to the fixing of minimum rates. The contract carrier may not charge less than the rates so fixed ,but is left free to charge as much more as he sees fit and can obtain * * *"

Pursuant to the legislative mandate in Sections 4a and 6aa, Article 911b, the Railroad Commission of Texas promulgated minimum rates for Texas contract carriers in the following orders.

The order of August 22, 1931:

"State of Texas.

"Railroad Commission of Texas.

"Austin.

"Commissioners: C. V. Terrell, Chairman, Lon A. Smith,,

"Pat M. Neff, C. F. Petet, Secretary.

"General Order No. 25.

Austin, Texas, August 22, 1931

"Whereas, Chapter 314, of the General Laws of the State of Texas, passed by the Forty-first Legislature, Regular Session, as amended by Chapter 24, of the General Laws of the Second Called Session thereof, having been further amended by Chapter 277 of the Acts of the Forty-second Legislature Regular Session, by declaring all persons, firms, co-partnerships, corporations, companies, associations and joint stock associations other than common carriers, engaged in the transportation of property for compensation or hire over the highways of Texas, to be Contract Motor Carriers.

"And Whereas, said above mentioned acts imposed upon the Railroad Commission of Texas, the duty to fix, prescribe or approve rates and charges of such Contract Motor Carriers, as well as to fix, prescribe or approve just and reasonable rules and regulations to be observed by such Contract Motor Carriers.

"It is, Therefore, Ordered by the Railroad Commission of Texas, that, effective August 22, 1931, all Contract Motor Carriers as hereinbefore defined, be and they are hereby ordered to observe and apply as minimum temporarily and until further orders of this Commission, pursuant to hearing called for Monday, August 31, 1931, under Motor Freight Circular No. 1297, the rates, ratings, rules and regulations heretofore prescribed or approved by this Commission for observance by Class 'A' Motor Carriers, as shown in Railroad Commission of Texas Motor Freight Class and Commodity Tariff No. 1, as amended; Railroad Commission of Texas Motor Freight General Rules Circular No. 1, as amended; and Railroad Commission of Texas Commodity Tariff No. 2, (Cotton and Cotton Linters), as amended.

"Penalties.

"If any motor carrier, or any officer, agent, clerk, servant or employee or receiver, or his agents, servants, or employee, of any motor carrier operating as a contract carrier in this State, shall, directly or indirectly, or by any special rate, rebate, drawback, or other device, for or on behalf of such contract carrier, knowingly charge, demand, or contract for, collect or receive from any person, firm or corporation a less compensation for any service rendered or to be rendered by any such contract carrier than is prescribed for said service by said commission, such contract carrier or any officer, clerk, servant or employee or receiver, his agents, servants, or employee, of such contract carrier shall be guilty of misdemeanor and, upon conviction shall be fined in a sum not to exceed two hundred dollars ($200.00) for each offense; and every person who violates or fails to comply with, or procures, aids or abets any contract carrier in the violation of the provisions here-

of, shall likewise be guilty of a misdemeanor and, upon conviction shall be punished by a fine of not more than two hundred dollars ($200.00) for each offense."

The order of July 26, 1940

"Motor Freight Class and Commodity Tariff

No. 1-A Effective 7-26-40.
"Seventh Revised Page 15 (Cancels 16th Revised Page 15).

"Section No. 3.

"General Application of Rates.

"Item No. 470. Rates, Rules and Regulations in this Tariff, or as May be Amended, Shall be Observed:

"(A) By Common Carrier Motor Carriers on Texas Interstate Traffic. (See Exception.).

" * * * *

"(B) By contract motor carriers as minimum, on Texas Intrastate Traffic, unless permits issued by the Commission provided to the contrary."

The history of petitioner's contract carrier application to transport the commodities of respondent is typical of such proceedings in Texas.

Under date of August 26, 1940, petitioner applied to the Railroad Commission of Texas for a per-

mit to operate as a contract carrier for respondent, the application proposing the transportation of property for compensation or hire over the highways of Texas other than as a common carrier motor carrier or as a private carrier. Exhibit E of the application read:

> "Applicant proposes that the tariff to be charged for the service proposed to be rendered will be that as promulgated by the Railroad Commission of Texas."

After requisite notices, hearings, and submission to the Commission of the first contract between petitioner and respondent, embodying the agreement to conform to the rates prescribed by the Commission, the Railroad Commission granted petitioner's application by its order dated June 16, 1941, the pertinent provisions of which read as follows:

> "The Commission, after carefully considering the evidence the laws and its own rules and regulations, is of the opinion that the character of business proposed to be done by the applicant strictly conforms with the definition of a contract carrier; and that the proposed operation of the applicant as a contract carrier within a radius of 150 miles of Wichita Falls, and within a radius of 150 miles of Amarillo, will not impair the efficient public service of any authorized common carrier or common carriers now adequately serving the same territory. In connection with the rates, the Commission directs attention to its tariffs and orders prescribed as a minimum rate to be charged by contract car-

riers the rates prescribed for common carrier motor carriers."

It is therefore apparent that petitioner sought a Texas contract carrier permit to transport the products of respondent upon the representation and agreement of both parties to charge the rates promulgated by the Railroad Commission, and that in the order of the Commission granting the permit, specific rates were prescribed for, and made applicable to, petitioner's contract carriage services for respondent.

As heretofore mentioned, the judicial expressions in this case are in agreement that the Texas contract carrier rate structure is valid and that the minimum contract carrier rates fixed by the Railroad Commission attached to the contract carriage of petitioner for respondent. This statement is predicated upon the following excerpts from the majority and dissenting opinions of the Circuit Court of Appeals. The majority said:

> "We will not enter into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier without first determining whether or not it was in competition with, and performing services substantially similar to, a common carrier, nor the related question as to whether Section 6-aa, without making same applicable to contract carriers in competition with common carriers, is unconstitutional and void, for we agree with Appellee that the supplemental contract to pay rates less than those

> provided by the Railroad Commission was void, but we think that even so, the judgment should have been against him."

It is manifest that the only basis upon which the second contract (wherein the parties set their own rates) would be void is that such contract contravened valid statutes and rate orders of the Railroad Commission; the parties could obviously contract for their own rates if there were none prescribed by law applicable to them.

The dissenting opinion by Judge Hutcheson reads:

> "I think it clear that the district judge was right in the view he took, that the authorities in Texas leave in no doubt that rates prescribed by the Texas Railroad Commission are the only proper rates which may be charged and that a cause of action arises out of the statute in favor of any person who performs the services for which the rates are prescribed. The Railroad Commission's general order of 1931, therefore, prescribing common carrier rates as minimum rates was applicable to Steele's permit and was valid and enforceable."

It would therefore appear that the payment by respondent to petitioner of less than the minimum Texas contract carrier rates resulted in an unlawful freight rate rebate and that this is an ordinary rebate suit, touching which, in the words of the dissenting opinion of Judge Hutcheson, "an overriding public policy," upon which "the right to recover the legal charges. . . rests . . . is so imperative that it

may not be defeated by the conduct of the parties in entering into legal and evasive arrangements which it is the very purpose of the policy to strike down."

The evasive arrangements referred to in the above excerpt from the dissenting opinion consisted of the second contract between petitioner and respondent, entered into after the granting of the contract carrier permit, in which the parties set their own rate of cost plus ten percent, which rate was lower than the minimum contract rate fixed by the Railroad Commission. Since the circumstances, purposes, and provisions of this contract are discussed at great length in the judgment of the Circuit Court, additional analysis is pretermitted here; suffice to say, the particular arrangements between the parties resulted in the rebating of rates, the knowledge and purposes of which were joint and mutual between petitioner and respondent.

POINT I

Texas minimum contract carrier rates, and their enforcement, are matters of the public interest; advancement of the higher public policy inherent in strict enforcement of such rates calls for intervention by the Court, notwithstanding the carrier and shipper are in Pari Delicto in their joint and mutual rate violations.

BRIEF OF ARGUMENT

The original public policy of the State of Texas regarding the establishment and enforcement of freight and passenger tariffs crystallized in relation to the railroads. Texas Constitution, Article 10, Section 2; *Producers Refining Company* v. *M. K. & T. Ry. Co.*, 13 S. W. (2d) 679; and companion case, same style, 13 S. W. (2d) 680; *Texas and N. O. Ry. Co.* v. *Yates, et al*, 139 Tex. 89, 161 S. W. (2d) 1050; *Texas and N. O. Ry. Co.* v. *East Texas Gravel Co.*, 175 S. W. (2d) 435. Pertinent elements of this policy are: The chief function of the State administrative agency, the Railroad Commission, is to fix rates binding alike upon shipper and carrier and subject to revision only in the mode expressly provided; the prevention of rate discriminations and rebates; the public duty of the carrier to collect, and the shipper to pay, the legally prescribed rates, which obligation cannot be affected by estoppel, mistake, design, positive contract to the contrary, or by any other device; and, as said by the Commission of Appeals of the Supreme Court (opinion adopted by Supreme Court) of Texas in *T. and N. O. Ry. Co.* v. *Yates*, supra, "In a word the purpose of our statutes, as they relate to intrastate freight rates, is in every essential respect the same as that of the Federal statutes which we had under consideration in *Houston & T. C. R. Co.* v. *Johnson*, Tex. Com. App., 41 S. W. (2d) 14, 83 A. L. R. 241."

With the advent of highway freight and passenger transportation in Texas, these principles have

been applied with equal force and reason by the Legislature and Courts of Texas to highway motor carriers. In *Texas & P. Ry. Co. Co.* v. *Railroad Commission*, 138 S. W. (2d) 927, 930, it was said:

> "Development of motor transportation in the past two decades, and the increasing use of the highways for commercial purposes by both common and private carriers, with consequent safety hazards and impairment of road beds, has necessitated stringent regulation thereof in the public interest. The primary objective and reasons therefor were to protect the safety and convenience of the public in the use thereof, and to preserve the highways themselves, constructed with the taxpayers money. But these were not the only purposes sought in such regulation. The Act in question clearly discloses the additional purposes of preserving other established lines of transportation, and even though a public need be shown for additional operation, a further studied effort is shown to prevent, through regulation, unfair, discriminatory, or destructive competition between such authorized carriers as would ultimately impair their usefulness."

The public purpose served by the regulation of contract carriers in Article 911b of the Revised Statutes of Texas, was recognized by this Honorable Court in *Stephenson* v. *Binford*, supra, pp. 272, 273:

> "Debatable questions of this character are not for the courts, but for the legislature, which is entitled to form its own judgment. Sproles v. Binford, 286 U. S. 374, 388-389. Leaving out of consideration common carriers by trucks, impairment of the railway freight service, in the very nature of things, must result, to some de-

gree, in adding to the burden imposed upon the highways. Or stated conversely, any diversion of traffic from the highways to the railroads must correspondingly relieve the former, and therefore, contribute directly to their conservation. There is thus a substantial relation between the means here adopted and the end sought. This is made plain by the Sproles case, supra (p. 394):

"'The State has a vital interest in the appropriate utilization of the railroads which serve its people, as well as in the proper maintenance of its highways as safe and convenient facilities. The State provides its highways and pays for their upkeep. Its people make railroad transportation possible by the payment of transportation charges. It cannot be said that the State is powerless to protect its highways from being subjected to excessive burdens when other means of transportation are available. The use of highways for truck transportation has its manifest convenience, but we perceive no constitutional ground for denying to the State the right to foster a fair distribution of traffic to the end that all necessary facilities should be maintained and that the public should not be inconvenienced by inordinate uses of its highways for purposes of gain. * * *'".

To like effect are the Texas Supreme Court cases of Ex parte Sterling, et al., 122 Tex. 108, 53 S. W. (2d) 294, and *New-Way Lumber Company v. Smith*, 128 Tex. 173, 96 S. W. (2d) 282. Also, *Anderson v. Thomas*, 26 Pac. (2d) 60, by the Supreme Court of Oregon; *Commission v. Grimshaw*, 53 Pac. (2d) 1, and *State v. Grimshaw*, 53 Pac. (2d) 13, by the

Supreme Court of Wyoming; *Riley* v. *Lawson*, 143 So. 619, by the Supreme Court of Florida; and *Kelly* v. *Finney, et al*, 194 N. E. 157, by the Supreme Court of Indiana.

The recognition by this Honorable Court in *Stephenson* v. *Binford*, supra, of the public purpose in the legislative provision for minimum contract carrier rates was cited earlier in this brief. Coupled with the specific purpose of diverting traffic from the highways, is the corollary public purpose of non-impairment of common carriers, both rail and highway. The vulnerable point of impairment is in the matter of rates, and the safeguard of non-impairment is strict enforcement of the legal rates. It is in the highest public interest that the pivotal and vital limitation on Texas contract carrier operations in the matter of minimum rates shall not be undermined or ways opened for successful private contracts, undercharges, and rebates between contract carriers and shippers in Texas; to permit such a result would destroy the two public purposes inherent in the Texas contract carrier freight rate structure: the utilization and non-impairment of existing carriers, railroad and truck; and the reduction of traffic on the highways of Texas which flows from such non-impairment and maximum utilization.

This Honorable Court has held on many occasions that applicable freight rates are binding alike upon carrier and shipper; that no mistake, device, scheme, or subterfuge will relieve a carrier of the obligation to collect, and the shipper of the obligation to pay,

such rates; and that to hold otherwise would countenance the very practices condemned by the law. It was early said in *G. F. & A. Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197:

> "* * * But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. Chi. & Alt. R. R. v. Kirby, 225 U. S. 153, 166; Kansas Southern Ry. v. Carl, supra; A., T. & S. F. Ry. v. Robinson, 233 U. S. 173, 181; Southern Ry. v. Prescott, supra. * * *".

The case of *Papetti* v. *Alicandro*, 58 N. E. (2d) 155, by the Supreme Judicial Court of Massachusetts, is singularly in point here. The statutes of Massachusetts are almost identical with those of Texas regulating contract carriers. Papetti was a Massachusetts contract carrier from February, 1937, until March, 1940, when he became a common carrier; in both capacities he was authorized to carry the commodities involved. "During the entire period the Department of Public Utilities established minimum rates for the carriage of such commodities by contract and common carriers"; (Page 156 of opinion). Papetti transported gasoline and fuel oil for Alicandro, was paid the legal rate upon

statements rendered, after which he rebated to Alicandro in cash the difference between the legal rate and a lower rate agreed upon between the parties. Suit was by Papetti to recover the difference between the minimum legal rate and the amount actually received by him for the transportation services. The opinion of the court upholding Papetti's right to recover notwithstanding the illegality of the scheme which was acquiesced in both parties, is a full and comprehensive brief upon the questions involved in that, and in this case, including excerpts from opinions by this Honorable Court which are controlling and conclusive. Such following portion of the opinion is therefore adopted as the brief of the State of Texas at this point:

> "Unless the plaintiff is prevented by some rule of law, he is entitled to maintain this action. *We think that the plaintiff not only is not so barred, but that it is both his right and duty to recover the rebates.* The provisions of G. L. (Ter. Ed.) c. 159B, as inserted by St. 1934, c. 264, and as revised by St. 1938, c. 483, bear resemblance respectively to the provisions of the interstate commerce act, as to railroads, 49 U. S. C. A. §§ 6, 2, 10 and as to common carriers by motor vehicle, 49 U. S. C. A. §§ 316-327 the latter being first enacted in 1935, 49 U. S. Stat. 558-567. With respect to the former Federal enactment numerous decisions of the Supreme Court of the United States and of this court are authorities for the plaintiff. 'Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must

pay.' Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 653, 33 S. Ct. 391, 395, 57 L. Ed. 683. The 'effect of filing schedules of rates with the Interstate Commerce Commission was to make the published rates binding upon shipper and carrier alike, thus making effectual the purpose of the act to have but one rate, open to all alike, and from which there could be no departure.' Boston & M. R. R. v. Hooker, 233 U. S. 97, 112, 34 S. Ct. 526, 528, 58 L. Ed. 868, L. R. A. 1915B, 450. 'The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to charge. *The consignee could not escape the liability imposed by law through any contract with the carrier.*' New York Cent. & H. R. R. v. York & Whitney Co., 256 U. S. 406, 408, 41 S. Ct. 509, 510, 65 L. Ed. 1016; Pittsburgh, C., C. & St. L. R. Co. v. Fink, 250 U. S. 577, 582, 40 S. Ct. 27, 63 L. Ed. 1151. See Texas & P. R. Co. v. Mugg & Dryden, 202 U. S. 242, 26 S. Ct. 628, 50 L. Ed. 1011; Texas & P. R. v. Abilene Cotton Oil Co., 204 U. S. 426, 445, 446, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 485, 486, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A., N. S., 671; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 652, 33 S. Ct. 391, 57 L. Ed. 683; Louisville & N. R. Co. v. Maxwell, 237 U. S. 94, 98, 35 S. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; Baldwin v. Scott County Milling Co., 307 U. S. 478, 484, 485, 59 S. Ct. 943, 83 L. Ed. 1409. In Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U. S. 516, 521, 59 S. Ct. 612, 614, 83 L. Ed. 953, it was said, 'This Court has had occasion recently to sustain action of the Commission aimed at carriers' practices resulting in collection of less

than the tariff rate. It is equally important to aid the efforts of a carrier in collecting published charges in full. Involuntary rebates from tariff rates should be viewed with the same disapproval as voluntary rebates.' 'The lawful rate as established by the rates and schedules filed by the carrier must be collected.' American Ry. Exp. Co. v. Mohawk Dairy Co., 250 Mass. 1, 6, 7, 144 N. E. 721, 723, 35 A. L. R. 14. The carrier cannot be estopped to do so. New York, N. H. & H. R. Co. v. York & Whitney Co., 215 Mass. 36, 40, 102 N. E. 366. Railway Express Agency, Inc. v. Michelson, 311 Mass. 704, 706, 42 N. E. 2d 805. Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 176, 63 S. Ct. 172, 87 L. Ed. 165. See cases collected in 13 C. J. S., Carriers, § 397. See also Perkins v. New York, N. H. & H. R. Co., 232 Mass. 336, 339, 122 N. E. 306; W. H. Blodget Co. v. New York Cent. R. Co., 261 Mass. 365, 370, 159 N. E. 45, 55 A. L. R. 900; New York, N. H. & H. R. Co. v. Lord & Spencer, Inc., 273 Mass. 583, 586, 174 N. E. 179. *The usual principles of illegality in contracts have no application.* See Metz Co. v. Boston & M. R. R. 227 Mass. 307, 309, 310, 116 N. E. 475. The established rates are a matter of public right, and only the running of the statute of limitations can preclude a carrier from recovering the full amount. As was said in Louisville & N. R. Co. v. Central Iron & Coal Co., 265 U. S. 59, 65, 44 S. Ct. 441, 442, 68 L. Ed. 900, 'No contract of the carrier could reduce the amount legally payable, or release from liability a shipper who had assumed an obligation to pay the charges. *Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full*

> *amount by a person liable therefor.'* See Midstate Morticultural Co. Inc. v. Pennsylvania R. Co., 320 U. S. 356, 64 S. Ct. 128; Louisville & N. R. Co. v. Dickerson, 6 Cir., 191 F. 705, 709; McFadden v. Alabama Great Southern R. Co., 3 Cir., 241 F. 562, 565; Louisville & N. R. Co. v. Williamson, 5 Cir., 87 F. 2d 34, 35; Pennsylvania R. Co. v. Titus, 216 N. Y. 17, 22, 109 N. E. 857, L. R. A. 1916E, 1127 Ann. Cas. 1917C, 862." (Emphasis added).

Artic Roofings, Inc. v. *Travers*, 32 Atl. (2d) 559, by the Supreme Court of Delaware, is likewise directly in point with reference to analogous provisions of the Federal Motor Carrier Act. The suit was to recover the difference between freight charges actually received by the carrier and the amount due according to the schedules filed. The opinion recites "Moreover, it is not denied that all of the essential elements of actionable fraud appeared; but the materiality of these allegations is questioned." The following excerpts from the opinion of the Court demonstrate the application of the principles to the case at hand:

> " * * * but, notwitstanding the admitted fraud of the carrier, the intended purpose and scope of the Federal Motor Carrier Act, 49 U. S. C. A. § 301 et seq., will not permit the application of these general principles.
>
> " * * * The Motor Carrier Act was based on sound reasons of policy, for the general public good, and was intended to prevent direct or indirect discriminations in transportation rates, when an interstate carrier operates under it, he

has no liberty of choice in fixing charges by a special contract with the shipper. * * *

"The Act being primarily for the public good, the principles of estoppel will not defeat the carrier's rights, though he unintentionally misquoted the scheduled rate to the shipper before the delivery of the goods for transportation, and material losses were caused thereby. * * * Nor can there be any real distinction between a mere unintentional misrepresentation and a fraudulent misrepresentation by the carrier. Kansas City So. R. Co. v. Carl supra. (227 U. S. 639, 33 S. Ct. 391, 57 L. Ed. 683). In either case, the usual common law rights of the individual shipper are subordinated to the statutory requirement of uniformity in rates; and while there may be cases of hardship, the general legislative policy, declared by the Act, controls."

In accord with the foregoing cases and, it is believed, in conflict in principle with the Fifth Circuit Court judgment in the instant case, are the Fifth Circuit Court cases of *Western Grain Co.* v. *St. Louis-San Francisco Ry. Co.*, 56 F. (2d) 160; *Battles* v. *Braniff*, 146 F. (2d) 336; and *Bowen Motor Coaches* v. *N. Y. Casualty Co.*, 139 F. (2d) 332.

Also in accord are the Texas cases of *Herron Transportation Co.* v. *Marmion*, 113 S. W. (2d) 291; *H. and T. C. R. Co.* v. *Johnson*, 41 S. W. (2d) 14, 83 A.L.R. 241; *Texas and N. O. Ry. Co.* v. *Yates*, supra; *Brown & Root, Inc.* v. *Traders and General Ins. Co.*, 135 S. W. (2d) 534 (Writ dismissed, correct judgment).

In our State and National Jurpisurdence, therefore the *pari delicto* doctrine has had no place in suits involving collection by the carrier and payment by the shipper of legally prescribed freight. This is because the public interest in freight rates, and in their enforcement, transcends the public policy involved in the rule of non-intervention in behalf of a party *in pari delicto*. The applicable rule in this respect is succinctly stated in 12 American Jurisprudence, page 731, paragraph 215, as follows:

> "The fiction of acting for the public by which relief is granted to a party *in pari delicto* must *a fortiori* apply to the public itself when in fact acting in its own interest. The extension of the rule of non-enforceability, based as it is upon the maxim 'in pari delicto' to the case of the State seeking to prevent public injury would be without the slightest foundation in sound logic or justification in right reasoning."

Relief is given to the public through a party *in pari delicto*, even though he is a *particeps criminis*, for the achievement of a superior public purpose. The New Jersey Court of Error and Appeals in *McCarter v. Firemen's Insurance Company*, 73 Atl. 80, 87, quotes with approval the statement of the rule in Story, Eq. Jur., paragraph 298, as follows:

> "In cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis* is not in equity material. The

reason is that the public interest requires that relief should be given; and it is given to the public through the party."

The effect and result of the judgment of the Circuit Court in the instant case is aptly expressed in the McCarter case, supra, at page 87 in these words:

> "Be this as it may, the fact is that, if upon neither of these grounds preventive relief may be had by the State, no combination can be so hostile to the public interest, or so flagrant in its defiance of public policy, but that it may effectively shield itself from such interference on behalf of the public, by the simple device of casting its proposed violation of public policy in the form of a contract for a self-imposed restraint of trade. I cannot believe that this is the actual state of our jurisprudence on this vitally important subject."

The compulsion of this higher public policy was likewise given effect by the Montana Supreme Court in *Fergus County* v. *Osweiler*, 86 Pac. (2d) 410, 411, in these words:

> "While generally a party to an illegal contract will not be permitted to enforce it, yet there is an exception to the rule which has been so uniformly accepted by the court that it is no longer regarded as an exception, but has itself become a general rule. It is succintly stated in the Restatement of the Law of Contracts, Section 601, as follows: 'If refusal to enforce or to rescind an illegal bargain would produce a harmful effect on parties for whose protection the law

making the bargain illegal exists, enforcement or recision, whichever is appropriate, is allowed.'"

In accord is the Texas case of *Wright* v. *Wight & Wight*, 229 S. W. 881.

The holding of the Circuit Court majority is demonstrated by the following paragraph from its original opinion:

> "Moreover, when General Mills and Steele agreed to the insertion of paragraph 13, as suggested and drawn by Mr. Morgan, for the sole purpose of getting by the Railroad Commission, well knowing that such a provision was not to be a permanent part of the contract and that it was not expected to be retained or complied with; they committed a fraud upon the lawfully constituted officials of the State of Texas, viz., the Railroad Commission. The conclusion seems inescapable that both parties knew full well that this was a subterfuge, and that neither had any idea of paying the rates provided for in that instrument, and that their participation in the execution thereof with the intent to use it only as a 'front' for getting a permit for Steele was an act contrary to good morals and that tended to injustice and to interfere with the purity of the administration of the law such as puts both parties *in pari delicto* with no right to seek advantage or recovery out of paragraph 13, the spurious portion of the instrument."

In its Per Curiam opinion denying the petition for rehearing, the Circut Court majority enlarged its application of the *pari delicto* doctrine to include the

following two elements which were applied to the subject matter of this case: The carrier (petitioner here) is the "prime offender"; the contract sued on by the carrier having been fully executed, rather than executory, the Court should not lend its aid to one in preference to the other. The Texas case of *Wright* v. *Wight & Wight*, supra, and the case of *Spring Company* v. *Knowlton*, 103 U. S. 49, together with texts from 10 Tex. Jur., page 242, paragraph 140, and 12 Am. Jur., page 725, paragraph 213, were cited in support of the conclusions in the Per Curiam opinion.

The Circuit Court did not take cognizance of the fundamental principle advocated by the State; namely, that it is in the public interest that carriers collect and shippers pay the legally prescribed contract carrier rates, notwithstanding the parties are *in pari delicto* in their joint violations. The reasoning of the Per Curiam opinion, and of the cases and texts cited, is pertinent only to the restricted question of allowing one party *in pari delicto* relief against the other party, separate and apart from the further proposition of allowing recovery in the public interest. The latter is the larger and pivotal question.

This was precisely the point in the Texas case of *Wright* v. *Wight & Wight*, supra, cited in the Per Curiam opinion and the reasoning of that Court demonstrates the correct logic. The contract in the case was fully executed and it was urged "Appellees say, however, they should be allowed to recover be-

cause the public interest will be better promoted by granting than by denying them relief." The Court recognized the validity of this proposition and disposed of it not upon the fact that the contract was executed, rather than executory, but upon the broader conclusion that the public interest would be more greatly served by denying recovery under the facts of that case:

> "It is true that as between parties *in pari delicto* relief will be granted if public policy demands it. In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public; the guilty party to whom relief is granted being only the instrument by which the public is served. The relief is granted to discourage such transactions by others.
>
> "But, we think, the public interest will be just as well served by denying a recovery to the appellees as it would be by granting such recovery and imposing the loss upon the appellant."

The Knowlton case by this Honorable Court and cited by the Circuit Court, did not involve in any respect the proposition that higher public policy called for intervention in behalf of a party *in pari delicto;* this Court was concerned only with the contract as between the parties themselves, in which case the law is that recovery back may be had to prevent the illegal thing from being done; whereas, if the illegal scheme has been fully executed, recovery by either party will be denied. But these propositions have no relevancy to a case where the particular relief or recovery is

in the public interest, where considerations of the status of the unlawful scheme are immaterial, and where the basis for the non-application of the *pari delicto* doctrine is constant. The correct analysis of the situation is effectively set forth in *Georgia R. R. v. Creety*, 5 Ga. App. 424, 63 S. E. 528, 529:

> "A contract or an agreement, executed or executory, for a rate different from the published rate, is void itself, but does not render the transportation wrongful, or the agreement to transport void or illegal, in the sense that services performed under it may not lawfully become the subject matter of an action in the courts. Merchants' Cotton P. and S. Co. v. Ins. Co. 151 U. S. 368, 388, 14 Sup. Ct. 367, 38 L. Ed. 195, 205."

With reference to the classification of the carrier by the Circuit Court as the "prime offender," the Knowlton case, cited by the Circuit Court, recognizes that the application or non-application of the *pari delicto* doctrine, and hence of the exception to the application in the greater public interest, cannot turn on a determination of which of the parties is in the greater delictum; this Court noted at page 60:

> "The rule is applied in the great majority of the cases, even when the parties to the illegal contract are *in pari delicto*, the question which of the two parties is the more blamable being often difficult of solution and quite immaterial."

In a contract carrier freight rate rebate case it is illogical to say, as did the Circuit Court, that the carrier is the "prime offender" because his trucks used the highways of the State; this for the obvious reason that it is for the transportation of the shipper's commodities, *and his only*, that the highways are used by the shipper's contract carrier. And it is certainly clear under the facts of this record that if, as held by the Circuit Court, petitioner and respondent committed a fraud upon the Railroad Commission, they were each a *particeps criminis* for mutually gainful purposes, the undercharge arrangements under the second contract between them being of mutual design and purpose.

The judgment of the Circuit Court held the second contract between petitioner and respondent, wherein they set their own rates, to be illegal and void, but the result of the judgment is to enforce this contract. Any such contract, or similar device, between any shipper and carrier in Texas will be an illegal contract, which fact will be inevitably known to both parties. There cannot be degrees of fraudulent conduct, and hence degrees of the application of the doctrine of *pari delicto*, in such a situation.

The unassailable fact is that nothing will more effectively prevent violations of the Texas minimum contract carrier rates by contract carriers and shippers in the manner involved in this case, than the knowledge of shippers that regardless of mistakes, private contracts, subterfuges, rebates, or what else, the carrier can successfully recover the amounts of

the minimum legal rates prescribed for the services rendered. Opportunity and incentive for circumvention of the rates will be thereby eliminated. This fact is implicit in the uniform holdings that carriers will be allowed recovery of the legal rates.

It is observed, finally, that the majority opinion of the Circuit Court intimates that the fact that the Texas statutes authorize penalty suits against rate violators by the Attorney General for the State of Texas, comprehends the full public interest in the enforcement of freight rates. The fact of these allowable penalty suits does not imply that such prosecutions, even under circumstances where they would lie, are to be considered as the adequate, and the only, public remedy. Penal provisions are characteristic of the Federal Motor Carrier Act and of the various State Motor Carrier Acts; it has never been held or suggested that this fact bore any relevancy whatever to the enforcement and collection of legal freight rates by means of civil suits for recovery of voluntary or involuntary freight rate rebates.

CONCLUSION

The public interest in Texas minimum contract carrier rates, and in their enforcement, is equal in importance and strictly analogous to the enforcement of common carrier freight rates in Texas. The fundamental basis for the public policy involved is the same. Variations in the particular statutes relating to the different forms of carriage do not affect the underlying requirements of rate enforce-

ment. The settled law that the courts will compel payment of the amount of the legally prescribed freight rates for the particular transportation services performed is applicable with equal force to each form of carriage. The shippers and carriers are agents and trustees for the public and the actions of neither or both should defeat the purposes of the law which require full and exact payment of legal freight rates in the public interest.

There have not been exceptions to the above rule in either national, state, or Texas jurisprudence, regardless of the presence of elements of mistake, fraud, estoppel, hardship, or other circumstances. Most usually, however, hardship is non-existent and the equities are in favor of neither the carrier nor the shipper. This is demonstrated here. It was the obligation of respondent, a foreign corporation doing business in Texas, to observe and respect the laws of Texas and the orders of the administrative agency of the State, the Railroad Commission, in the use by respondent of a Texas contract carrier permittee performing transportation services for respondent only. The minimus of this obligation is compliance with the rates fixed by the Railroad Commission for the transportation of Respondent's commodities over the highways of Texas by a Texas motor carrier. Apart from knowledge of Texas law with which respondent is charged, and bound to respect, the record is clear that respondent through its agents collaborated in, and acted with full knowledge of, every phase of the matters involved in this case. Respondent elected to utilize for its benefit a

creature of the Texas statutes—the Texas contract carrier—and is bound to the obligations of such usage. *Compare Pierce Oil Co.* v. *Phoenix Refg. Co.*, 259 U. S. 125, 66 L. Ed. 855; *Shepard* v. *Barron*, 194 U. S. 553, 565, 48 L. Ed. 1115; *St. Louis Malleable Casting Co. v. Prendergast Const. Co.*, 260 U. S. 469, 472, 67 L. Ed. 351.

No equities or other considerations are present in this case to justify the abrogation of settled law and the defeat of the high public policy inherent in strict enforcement of the contract carrier rates of the State of Texas.

It is respectfully suggested that the judgment of the Circuit Court of Appeals for the Fifth Circuit is error of such magnitude as to call for an exercise of this Honorable Court's power of supervision and that this Honorable Court should grant petitioner's Application for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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